TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 302.

STONE, SAND AND GRAVEL COMPANY AND AMERICAN SURETY COMPANY OF NEW YORK, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED JULY 15, 1912.

(23,296)

(23,296)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 721.

STONE, SAND AND GRAVEL COMPANY AND AMERICAN SURETY COMPANY OF NEW YORK, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 16, 1912.

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UNITED STATES OF AMERICA.

UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT.

PLEAS AND PROCEEDINGS had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the third Monday in November, A. D. 1911, at New Orleans, Louisiana, before the Honorable Don A. Pardee and the Honorable David D. Shelby, Circuit Judges, and the Honorable Thomas S. Maxey, District Judge.

THE STONE, SAND AND GRAVEL COMPANY, AND THE AMERICAN SURETY COMPANY OF NEW YORK,

Plaintiffs in Error,

versus

THE UNITED STATES OF AMERICA,

Defendant in Error.

BE IT REMEMBERED, That heretofore, to-wit, on the 18th day of August, A. D. 1911, a transcript of the record of the above styled cause, pursuant to a writ of error to the Circuit Court of the United States for the Eastern District of Louisiana, was filed in the office of the clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2271, as follows:

UNITED STATES OF AMERICA.

CIRCUIT COURT OF THE UNITED STATES, FIFTH CIRCUIT AND EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

THE STONE, SAND AND GRAVEL COMPANY AND THE AMERICAN SURETY COMPANY OF NEW YORK,

Plaintiffs in Error.

versus No. 13,261.

THE UNITED STATES OF AMERICA,

Defendant in Error.

T. M. & J. D. Miller, Esquires, for the Stone, Sand and Gravel Company;

Demegre & Blair, Esquires, for the American Surety Company of New York, Plaintiffs in Error;

Charlton R. Beattie, Esquire, United States Attorney, and W. J. Wagnespack, Esquire, Assistant United States Attorney, for the United States, Defendant in Error.

WRIT OF ERROR, from the United States Circuit Court of Appeals for the Fifth Circuit to the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, New Orleans Division, returnable within thirty (30) days from the twenty-fourth (24th) day of July, A. D. 1911, at the City of New Orleans, State of Louisiana.

2 PETITION.

Filed August 31, 1904.

U. S. Circuit Court Eastern District of Louisiana.

United States
vs. No. 13,261.
Stone, Sand & Gravel Co., et als.

To the Honorable, the Judges of the United States Circuit Court for the Fifth Circuit and Eastern District of Louisiana.

The petition of the United States of America, herein appearing through H. Generes Dufour, with respect, represents:

That the Stone, Sand & Gravel Company, a corporation created under the laws of the State of Louisiana, of which S. V. Fornaris is president, and I. Hechinger and J. Edward Crusel are receivers, appointed under a decree of the Honorable, the Civil District Court for the Parish of Orleans, State of Louisiana, and the American Surety Company of New York, a corporation created under the laws of the State of New York, and doing business in the State of Louisiana, represented in the City of New Orleans by Peter Pesoud, as its agent and attorney in fact, are justly and truly indebted unto your petitioner as hereinafter set forth for the following reasons, to-wit:

That on the 14th day of June, 1899, your petitioner, through its proper and duly authorized officers, entered into a contract with the Stone, Sand & Gravel Company, for the excavation of seven million five hundred thousand (7,500,000) cubic yards of earth for the diverting of the mouth of the Yazoo River, all of which will more fully and at large appear by reference to the proposal of the said Stone, Sand & Gravel Company and the contract aforesaid, which are hereto annexed and made part hereof.

That on the 15th day of June, 1899, the said Stone, Sand & Gravel Company, as principal, and the American Surety Company of New York, as surety, did enter into a
3 bond and obligation in the sum of seventy-five thousand dollars ($75,000.00) in favor of your petitioner, conditioned that the said Stone, Sand & Gravel Company would

well and faithfully perform all and singular the condition of its said contract; certified copy of which bond is hereto annexed and made part hereof;

That from time to time after the execution of said contract and bond, the said Stone, Sand & Gravel Company did apply to your petitioner for an extension of time within which to begin the work called for by said contract; that said extensions were from time to time asked for by the said Stone, Sand & Gravel Company on account of the inability of said company, without fault of its own and for other causes contemplated by said contract to commence the work within the time provided in said contract; and, finally, the time within which to begin said work was extended by your petitioner to January 24th, 1900, said extensions being granted by your petitioner in strict compliance with the provisions of the contract and bond aforesaid in that particular provided, and as authorized thereby;

That, upon the failure of the said Stone, Sand & Gravel Company to prosecute the work within the term of the final extension granted, the chief of engineers of the United States Army did, on the 25th day of January, 1900, recommend that the contract be annulled and the work readvertised and relet; that subsequently, said recommendation was approved by the secretary of war of the United States, and the contract of said Stone, Sand & Gravel Company was annulled and notice thereof forthwith given to the said Stone, Sand & Gravel Company and the American Surety Company, of New York, in accordance with law and the provisions of said contract;

That on the 20th of July, 1900, your petitioner did enter into a contract with the Atlantic, Gulf & Pacific Company, of New York, for the purpose of prosecuting and completing the work for excavation for diverting the mouth of the Yazoo River, which the said Stone, Sand & Gravel Company had contracted to do, as aforesaid, and upon which it defaulted, as aforesaid; that the said contract with the Atlantic,

4 Gulf & Pacific Company of New York was made after due advertisement and in accordance with law;

That the contract price of said excavation under the contract of your petitioner and the Stone, Sand & Gravel Company was 8.49 cents per cubic yard; that the contract price with the Atlantic, Gulf & Pacific Company of New York, for said work, was 12.40 cents per cubic yard, the latter being 3.91 cents per cubic yard in excess of the former.

That the contract entered into between the said Stone, Sand & Gravel Company and your petitioner provided for the excavation of seven million, five hundred thousand (7,500,000) cubic yards, subject to an increase or decrease of as much as 25 per cent of the total of the approximate quantities, at the option of your petitioner;

That in the contract which your petitioner entered into with the Atlantic, Gulf & Pacific Company of New York, your petitioner exercised its right to decrease the amount of the excavation, and accordingly the total excavation made by said Atlantic, Gulf & Pacific Company of New York was reduced to five million, eight hundred and thirty-six thousand, three hundred and sixty-six (5,836,366) cubic yards.

That the difference in the price per cubic yard in the contracts aforesaid amounted to 3.91 cents per cubic yard, or the sum of $228,201.91 on 5,836,366 cubic yards;

That by reason of the breach of the said contract by the said Stone, Sand & Gravel Company, your petitioner was compelled to relet said contract, and complete said work at the increased cost aforesaid and it is therefore entitled to recover the difference in said costs, to-wit, the sum of $228,201.91, from the Stone, Sand & Gravel Company.

That the American Surety Company of New York having signed and executed, as surety, the bond of Stone, Sand & Gravel Company, in the sum of seventy-five thousand dollars ($75,000.00) for the faithful performance of said contract, is bound and liable in solido with said Stone, Sand & Gravel Company to your petitioner in the sum of seventy-five thousand dollars ($75,000).

Wherefore, petitioner prays that there be judg-
5 ment in favor of your petitioner against the Stone, Sand & Gravel Company and the said I. Hechinger and J. Edward Crusel, receivers of the said Stone, Sand & Gravel Company, and the said American Surety Company, of New York, in solido, in the sum of seventy-five thousand dollars ($75,000.00) with legal interest from judicial demand, and that there be judgment in favor of your petitioner and against the Stone, Sand & Gravel Company and I. Hechinger and J. Edward Crusel, receivers of the said Stone, Sand & Gravel Company, in the further sum of $153,201.91, with legal

interest from judicial demand, and petitioner prays for costs and for all general and equitable relief.

(Signed) H. GENERES DUFOUR,
Asst. U. S. Atty. for Petitioner.

Service accepted for Stone, Sand & Gravel Company. I. Hechinger and J. Edward Crusel, Receivers.
N. O., Aug. 31, '04.

T. M. MILLER,
Atty.

EXCEPTION OF AMERICAN SURETY COMPANY OF NEW YORK.

Filed June 21, 1907.

Eastern District of Louisiana.

United States
vs. No. 13,261.
Stone Sand & Gravel Company, et als.

Now, into Court, through undersigned counsel, comes the American Surety Company of New York, made defendant in the above entitled and numbered cause, and for peremptory exception to the plaintiff's petition says that said petition and the documents annexed thereto and forming a part thereof disclose no cause of action against this defendant.

6 Wherefore, it prays that this exception be maintained, and plaintiff's suit dismissed at its cost.

(Signed) CHAS. E. FENNER,
CHAS. PAYNE FENNER,
W. B. SPENCER,
CHAS. P. COCKE,
For Deft.
AMERICAN SURETY CO. OF NEW YORK.
THOS. W. BULLITT,
Of Counsel.

ANSWER OF STONE, SAND & GRAVEL COMPANY.

Filed November 4, 1907.

United States Circuit Court for the Eastern District of Louisiana.

United States
vs. No. 13,261.
Stone Sand & Gravel Company, et al.

Now comes the Stone, Sand & Gravel Company, one of the defendants in this cause, through its undersigned attorneys, and reserving the right to file amplified or special defenses to the petition of plaintiff, for answer thereto denies all and singular its allegations:

Wherefore, defendant prays that plaintiff's demand be rejected and its suit dismissed at its costs, and for general and equitable relief.

T. M. & J. D. MILLER,
Attorneys for Defendants.

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7 ANSWER OF THE AMERICAN SURETY COMPANY.

Filed November 4th, 1907.

United States Circuit Court for the Eastern District of Louisiana.

United States
vs. No. 13,261.
Stone, Sand & Gravel Co., et al.

Now comes the American Surety Company, one of the defendants in this cause, through its undersigned attorneys, and, reserving the right to file amplified or special defenses to the petition of plaintiff, for answer thereto denies all and singular its allegations.

Wherefore, defendant prays that plaintiff's demand be rejected and its suit dismissed at its costs, and for general and equitable relief.

(Signed) T. M. & J. D. MILLER,
Attorneys for Defendant.

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8 HEARING AND ORDER OVERRRULING EXCEPTIONS.

Extract From the Minutes.

November Term, 1907.

New Orleans, Monday, November 18th, 1907.

Court met pursuant to adjournment.

Present: Hon. Aleck Boarman, District Judge.

The United States
vs. No. 13,261.
The Stone, Sand & Gravel Company
and
The American Surety Co.

This cause came on to be heard this day upon the exceptions of the defendants.

Present: T. M. & J. D. Miller, for Stone, Sand & Gravel Co., Exceptor;

" T. W. Bullitt, of counsel for American Surety Co., Exceptor, defendant;

" Rufus E. Foster, Asst. U. S. Attorney for the United States, Plaintiff;

And was argued by counsel for the respective parties;

Whereupon and on consideration thereof it is ordered that said exceptions be overruled and that 10 days be allowed both defendants, as time in which to answer.

9 MOTION AND ORDER PERMITTING WITHDRAWAL OF ANSWER AND TO FILE EXCEPTION.

Entered and Filed Nov. 18, 1907.

United States Circuit Court, Eastern District of Louisiana.

The United States
vs. No. 13,261.
The Stone, Sand and Gravel Company
and
The American Surety Company.

On motion of T. M. & J. D. Miller, of counsel for defendants,

It is ordered that they have leave to withdraw the answer filed by them herein for the defendants and to file an exception for the defendants, the Stone, Sand & Gravel Co., which is now accordingly done.

ALECK BOARMAN,
Judge.

November 18th, 1907.

EXCEPTION OF THE STONE, SAND & GRAVEL COMPANY.

Filed November 18, 1907.

United States Circuit Court, Eastern District of Louisiana.

The United States
vs. No. 13,261.
The Stone, Sand and Gravel Company
and
The American Surety Company.

And now into Court, by its undersigned attorneys, comes the Stone, Sand & Gravel Company, one of the defendants in

the above numbered and entitled cause, and excepts
10 to the petition of the plaintiffs therein for the reason and upon the grounds following:

1.

The said petition discloses no cause of action against the defendant for the recovery of the sums of money claimed by the plaintiff or any other sum.

2.

Said petition fails to aver with certainty what particular covenant of the defendants contained in its contract, made part of the petition, has been broken; and because said petition is otherwise vague, indefinite and uncertain.

Wherefore, defendant prays that its said exceptions be maintained and said suit dismissed.

(Signed) T. M. & J. D. MILLER,
Attorneys for the Stone, Sand & Gravel Company.

ORDER FIXING CASE FOR TRIAL.

Extract From the Minutes.

November Term, 1907.

New Orleans, Saturday, December 14th, 1907.

Court met pursuant to adjournment.

Present: Hon. Aleck Boarman, District Judge.

United States
vs. No. 13,261.
Stone, Sand & Gravel Co., et al.

Ordered: That this cause be fixed for trial on Monday, January 13, 1908, at 11 A. M., the Asst. U. S. Attorney being present and taking notice.

It is further ordered that counsel for defendants be notified.

11 ANSWER OF THE STONE, SAND & GRAVEL COMPANY.

Filed January 9, 1908.

In the Circuit Court of the United States for the Eastern District of Louisiana.

The United States
versus
The Stone, Sand & Gravel Co., et al.

And now into Court comes the Stone, Sand & Gravel Company, made defendant in the above numbered and entitled cause, by its undersigned attorneys, and for answer to the plaintiff's petition therein, says:

It denies all and singular the allegations thereof, except in so far as the same may be hereinafter expressly admitted.

Further answering, said defendant says that after the making of its said contract with the plaintiffs and before the expiration of the time allowed for it to begin work with the capacity required by said contract, it did in the course of the execution thereof, excavate and remove 73,106 cubic yards of earth and other material, for which it became entitled to be paid at the rate of eight and 49/100 cents (8.49/100c.) per cubic yard, aggregating six thousand, two hundred, six and 69/100 dollars ($6,206.69);

That, although, on account of unforeseen and insurmountable difficulties, it had failed to secure the requisite equipment for the performance of said contract within the time limited for the commencement of the work and within the time allowed by the extension stated in said petition, it was still its purpose and intention, if allowed by the representatives of the plaintiffs, to proceed with and fully perform the work contemplated by said contract as speedily as possible and within a reasonable time, and so notified the engineer representing the Government in charge of said work, and requested
12 him to permit it to proceed with said work, and to keep its contract alive, accordingly. But, on the 7th day of March, 1900, the extension so granted having expired, the said engineer representing the Government, and being

thereunto duly authorized, did exercise the option provided for in said contract and did annul the same and did notify this defendant and its surety, in writing, on the same day, to-wit: the 7th day of March, A. D. 1900, by means whereof and by force of said contract and the provisions thereof, the aforesaid sum of money so earned by respondent became forfeited to the plaintiffs, and said contract, in respect to all rights and obligations of either and both parties thereto, became extinguished, and all liability on the part of this defendant ceased. And this defendant further answering, adopts as part of its answer and defense so much of the answer of its co-defendant as sets up the differences between its own contract and that subsequently let to the Atlantic, Gulf & Pacific Co., as if set out in extenso herein.

Wherefore, if the plaintiffs did cause the said work to be relet, in accordance with this defendant's said contract, as to all its plans, specifications and provisions touching the said work, which it denies, no recourse was left against this defendant to recover for any outlays made by the plaintiffs.

Wherefore, defendant prays that said petition be dismissed.

(Signed) T. M. & J. D. MILLER,
Attys. for Defendant.

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13 ANSWER OF THE AMERICAN SURETY COMPANY OF NEW YORK.

Filed January 9, 1908.

Circuit Court of the United States, Fifth Circuit, Eastern District of Louisiana, New Orleans Division.

United States of America, Plaintiff,
vs. No. 13,261.
Stone, Sand & Gravel Company
and
American Surety Company of New York, Defendants.

Answer of American Surety Co.

Comes the American Surety Company of New York, de-

fendant in the above entitled cause, by its undersigned counsel; and reserving unto itself the benefit of exceptions heretofore filed for answer to the plaintiff's petition, says:

Paragraph I.

The defendant denies all and singular the allegations in said petition contained excepting only such as may be hereinafter expressly admitted.

Paragraph II.

The defendant admits:

I. That its co-defendant, the Stone, Sand & Gravel Company, is a corporation created under the laws of the State of Louisiana, and I. Hechinger and J. Edward Crusel are Receivers thereof, appointed under a decree of the Civil District Court for the Parish of Orleans, State of Louisiana.

II. That the defendant, American Surety Company of New York, is a corporation created under the laws of the State of New York and doing business in the State of Louisiana.

14 III. That the Stone, Sand & Gravel Company entered into a contract with the United States bearing date June 14th, 1899, being the same mentioned in and filed as an exhibit with the petition herein.

IV. That the Stone, Sand & Gravel Company, as principal, and the American Surety Company of New York as surety, did execute and deliver to the United States a bond dated June 15th, 1899, being the same mentioned in the petition and filed as an exhibit therewith; that after the execution of said contract and bond, said Stone, Sand & Gravel Company did apply to the United States for an extension of time, within which to begin the work called for by said contract; that such extension was asked for by the Stone, Sand & Gravel Company on account of its inability to commence the work within the time provided in said contract, and that the time within which to begin the said work was, by the said United States, extended until January 24th, 1900.

V. That the Chief of Engineers of the United States did, on January 25th, 1900, recommend that said contract be annulled; that said recommendation was approved by the Secretary of War of the United States; that thereupon the said contract between the United States and the Stone, Sand & Gravel Company was annulled, and that notice of said annulment was forthwith given to the Stone, Sand & Gravel Company and the American Surety Company of New York.

The defendant expressly denies:

I. That the extension by the United States to the Stone, Sand & Gravel Company of time within which to begin the work contracted for until January 24th, 1900, was in compliance with the provisions of the said contract, or of the bond, or that same was authorized thereby.

II. That the annulment of the contract by the United States was caused by the failure on the part of the Stone, Sand & Gravel Company to prosecute the work contracted for or that said contract was annulled for any reason except the failure of the Stone, Sand & Gravel Company to begin work on or before January 24th, 1900, with a plant having the capacity designated and required by the contract; and the defendant denies each of the other allegations of the petition.

Paragraph III.

The defendant, American Surety Company of New York, for further answer to the petition, says:

After the execution and delivery of the contract and bond aforesaid, the United States and the Stone, Sand & Gravel Company, without the knowledge, consent or approval of the American Surety Company of New York, did by agreement between themselves as principals, alter the terms of the contract between them in the following particular, to-wit:

Whereas said contract, the performance of which was guaranteed by said American Surety Company, expressly required that the Stone, Sand & Gravel Company, should commence ac-

tive operations under the said contract on or before the fifth day of December, eighteen hundred and ninety-nine (1899), with sufficient force and plant for an output each calendar month of not less than two hundred and sixty thousand (260,000) cubic yards per month, the time for commencing operations was by agreement between said principals extended until January 24th, 1900, whereby a new and amended contract was made between said principals, to which the American Surety Company was not a party, and to which it did not assent, and thereby said American Surety Company became and was released from all obligation and liability under its said bond.

Paragraph IV.

The defendant, American Surety Company of New York, for further answer to the petition says:

The United States, because of the failure of the Stone, Sand & Gravel Company to commence active operations under the contract on or before January 24th, 1900, with such force and plant as the contract prescribes, did, with the sanction of the Chief Engineer annul said contract by giving notice in writing to that effect to the said Stone, Sand & Gravel Company, and by giving notice of said annullment to the
16 said American Surety Company of New York.

Said notices respectively were in words and figures as follows:

United States Engineer Office.
Vicksburg, Mississippi.

March 7th, 1900.

Stone, Sand & Gravel Co.,
203-205 Cora Building,
New Orleans, La.

Gentlemen:

As you have failed to prosecute the work of excavation for diverting mouth of Yazoo River near Vicksburg, Miss., in accordance with the specifications and requirements of the contract entered into by you, June 14th, 1899, the said contract hereby is annulled; this action having received the sanction

and approval of the Secretary of War and of the Chief of Engineers, U. S. Army.

Very respectfully,
THOS. L. CASEY,
Major, Corps of Engineers.

United States Engineer Office.
Vicksburg, Mississippi.

March 7th, 1900.

American Surety Company of New York,
No. 100 Broadway,
New York, N. Y.

Gentlemen:

I inclose for you information copy of a notice of annulment of contract of June 14th, 1899, between Major J. H. Willard, Corps of Engineers, U. S. Army, and the Stone, Sand & Gravel Company of New Orleans, La., for excavation for diverting mouth of Yazoo River, near Vicksburg,
17 Miss., a bond for fulfillment of which was executed by you June 15th, 1899.

Very respectfully,
THOS. L. CASEY,
Major, Corps of Engineers.

Said notices were given by the direction of the United States. No other or further notice was given to the Stone, Sand & Gravel Company or to the American Surety Company on the subject.

Neither at the time of said annulment nor at any time thereafter was the defendant, American Surety Company, notified that it was expected to perform, or that it would be permitted to perform on behalf of its principal the contract aforesaid, nor was it notified that the United States held, or would at any time assert a claim against it for damages for the breach or non-performance of said contract by the Stone, Sand & Gravel Company, but said defendant was permitted to rest and remain under the impression created by its notice aforesaid, that the said contract with the Stone, Sand & Gravel Co. had been annulled and that all rights and obligations thereunder had been cancelled and abrogated.

By virtue of the annulment of said contract as aforesaid, the

Stone, Sand & Gravel Company and the American Surety Company became, and each of them became, released and discharged from all obligation further to prosecute or to perform said contract and were released and discharged from all liability thereunder.

Paragraph V.

The defendant, American Surety Company of New York, for further answer to the petition, says:

After the notice of annulment of the contract with the Stone, Sand & Gravel Company, as hereinabove set forth, the United States, without the knowledge, consent or approval of the Stone, Sand & Gravel Company, or the American Surety Company, did enter into a contract with the
18 Atlantic, Gulf & Pacific Company, a corporation existing under the laws of the State of West Virginia, bearing date July 20th, 1900, for the excavation of earth for the diversion of the mouth of the Yazoo River, but upon terms and conditions materially and substantially differing from those contained in said contract between the United States and the Stone, Sand & Gravel Company. A copy of said contract with the Atlantic, Gulf & Pacific Company, together with the specifications attached thereto and made part thereof are filed herewith as part hereof, marked Exhibit A—this being the same contract mentioned and referred to in the plaintiff's petition.

The defendant, American Surety Company, states that by the making of the said new contract with the Atlantic, Gulf & Pacific Company, on terms so widely differing from the original contract with the Stone, Sand & Gravel Company, the United States abandoned said original contract and the American Surety Company became thereby released from obligations on its bond set forth in the petition. Defendant further states that said contract forms no proper basis or measure for the alleged breach of contract by Stone, Sand & Gravel Company as set forth in the petition herein, for the following reasons, to-wit:

First. The Stone, Sand & Gravel Company and the American Surety Company have been released from all obligation to prosecute or to perform the work contracted for in said orig-

inal contract with the Stone, Sand & Gravel Company, as hereinbefore set forth.

Second. The terms and conditions of said contract with the Atlantic, Gulf & Pacific Company are in divers important and material particulars different from those of the contract with the Stone, Sand & Gravel Company. Said two contracts differ inter alia in the following particulars, to-wit:

I. The contract with the Atlantic, Gulf & Pacific Company contains the following clause:

"The said Atlantic, Gulf & Pacific Company shall commence the work herein contracted for within six months (6 mos.) after date of notification of approval of the contract 19 by the Chief of Engineers, U. S. Army, and shall complete the same within thirty (30) months from such date of commencement."

This clause does not appear in the contract with the Stone, Sand & Gravel Company, and is in substitution for the following clause thereof:

"The said Stone, Sand & Gravel Company shall commence active operations under this contract on or before the fifth day of December, eighteen hundred and ninety-nine (1899), with sufficient force and plant for an output each calendar month of not less than two hundred and sixty thousand (260,000) cubic yards per month, which will be increased on or before the fifth day of June, nineteen hundred (1900) with sufficient force and plant for an output each calendar month of not less than three hundred and thirty thousand (330,000) cubic yards per month."

II. The contract with the Stone, Sand & Gravel Company contains the following clause:

"Upon the giving of such notice (of annulment) all money or reserved percentage due, or to become due, to party or parties of the second part, shall be or become forfeited to the United States."

This clause does not appear in the contract with the Atlantic, Gulf & Pacific Company, but in lieu thereof there was substituted the following clause:

"Upon the giving of such notice (of annulment) all payments to the party or parties of the second part under this contract shall cease, and all money and reserved percentage due or to become due the said party of the second part by reason of this contract shall be retained by party of the first part, until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatsoever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and all costs of inspection and superintendence incurred by the United States in excess of those paid by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all of the above mentioned sums out of or from the money or reserved percentage as retained as aforesaid."

III. The contract with the Stone, Sand & Gravel Company contains the following provision:

"It is further understood and agreed that in case of failure on the part of the party of the second part, to complete this contract as specified and agreed upon, that all sums due and percentage retained shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sum so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sum may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same."

"Payments will be made in accordance with paragraph 37 of the specifications attached to and forming a part of this contract, but unless the work is stopped or impeded by floods, storms, epidemics or other causes beyond control, as may be decided by the engineer officer in charge and approved by the

Chief of Engineers, U. S. A., it is agreed that if the total amount excavated up to the end of any calendar month should be found to be less than the total required up to that date by the above stated monthly rates of progress, no payment for work done during that month shall be due, nor shall any future payment become due under this contract until, by increased rate of excavation, it shall appear at the close of some subsequent month that the total excavation up to that time is equal to the total excavation required by the terms of this contract."

They do not appear in the contract with the Atlantic, Gulf & Pacific Company, but in lieu thereof the following provisions are substituted:

"It is further expressly understood and agreed
21 that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, the said United States shall have the right to recover from the party of the second part all cost of inspection and superintendence incurred by the said United States during the period of delay, and also whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid, to the party of the second part for completing the same. And the said party of the first part may deduct or retain all the above mentioned sums out of or from any money or reserved percentage that may be due or become due the party of the second part under this agreement."

"Payments shall be made to the said Atlantic, Gulf & Pacific Company in accordance with paragraph thirty-seven (37) of the specifications attached hereto."

IV. The contract with the Atlantic, Gulf & Pacific Company contained the following clause:

"It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment or act is to be construed as a waiver of the right of the party of the first part to reject any defective work of material or to require the fulfillment of any of the terms of the contract."

This clause is not contained in the contract with the Stone, Sand & Gravel Company.

V. The contract with the Atlantic, Gulf & Pacific Company contains this clause (Paragraph 10):

"The party of the second part further agrees to hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for or on account of the use of any patented invention, article or process included in the materials hereby agreed to be furnished and work to be done under this contract."

Specification 34, attached to said contract contains a similar provision.

This constitutes a distinct addition to the original contract, no similar provision being contained therein.

The above cited differences between the two con-
22 tracts as well as other differences not here noted, had a tendency to cause bidders or contractors under the new advertisement and contract to charge a higher price upon the work contracted to be done than would have been charged if the work had been let under the terms of the contract between the United States and the Stone, Sand & Gravel Company mentioned in the petition and said new contract with the Atlantic, Gulf & Pacific Company forms no proper measure by which to estimate or calculate damages for the alleged nonperformance of the said contract with the Stone, Sand & Gravel Company.

Wherefore defendant prays to be hence dismissed with its reasonable costs.

(Signed) W. B. SPENCER,
C. P. COCKE,
THOS. W. BULLITT,
Attorneys for Defendant, American Surety Company.

MOTION AND ORDER REASSIGNING CASE FOR TRIAL.

Extract From the Minutes.

November Term, 1907.

New Orleans, Monday, January 13th, 1908.
Court met pursuant to adjournment.
Present: Hon. Aleck Boarman, District Judge.

United States
vs. No. 13,261.
Stone, Sand & Gravel Co., et al.

On motion of the U. S. Attorney and of counsel for the de-defendants, it is ordered that this cause be reassigned for Jany. 24, 1908, at 11 A. M.

23 CASE CALLED, JURY IMPANELED, HEARING AND CONTINUANCE.

Extract From the Minutes.

November Term, 1907.

New Orleans, Friday, January 24th, 1908.

Court met pursuant to adjournment.

Present: Hon. Aleck Boarman, District Judge.

The United States
vs. No. 13,261.
Stone, Sand & Gravel Co.
and
American Surety Company of New York.

This cause was this day called for trial.

Present: Rufus E. Foster, U. S. Attorney, for the United States;
T. M. & J. D. Miller, for the Stone, Sand & Gravel Company;
Howe, Fenner, Spencer & Cocke and
T. W. Bullitt, for the American Surety Company of New York.

Whereupon the following named jurors were called and sworn to well and truly try the issue joined herein, to-wit:

1. John McGraw,
2. Morgan Earhardt,
3. Thomas A. Egan,
4. Joseph Littlefield,
5. Maurice Audry,
6. C. H. Hyams, Jr.,
7. J. D. Hardin,
8. Charles Stumpf,
9. Garland Wolfe,
10. G. G. Bradshaw,
11. Andrew Fitzpatrick,
12. George H. Bernos,

and the trial was proceeded with.

24 After hearing the pleadings, evidence and testimony, it was ordered by the Court that this cause be continued until to-morrow at 11 o'clock A. M., for further hearing.

HEARING AND VERDICT.

Extract From the Minutes.

November Term, 1907.

New Orleans, Saturday, January 25th, 1908.
Court met pursuant to adjournment.
Present: Hon. Aleck Boarman, District Judge.

The United States
vs. No. 13,261.
Stone, Sand & Gravel Company,
and
American Surety Company of New York.

This cause as continued from yesterday, was this day resumed, and the counsel for the respective parties, as well as the jurors empanelled in the cause being all present, the trial was proceeded with.

At the conclusion of the hearing of the testimony and evidence, the United States attorney moved the Court to direct a verdict in favor of the United States, and the counsel for the defendants moved the Court to direct a verdict in favor of the defendants.

After hearing the arguments of the counsel, the Court refused the motion of the U. S. attorney to direct a verdict in favor of the plaintiff, and granted the motion of the counsel for defendants to direct a verdict in favor of the defendants; whereupon the United States attorney reserved a bill
25 of exceptions to the ruling of the Court.

Thereupon, after receiving a charge from the Court, and under instructions from the Court, the said jury did then and there, in open Court, through their foreman, Andrew Fitzpatrick, render and deliver the following verdict, to-wit:

We, the jury, find a verdict in favor of both defendants. January 25, 1908.

ANDREW FITZPATRICK,
Foreman.

Whereupon it was ordered that the said verdict be recorded, and it is done accordingly.

MOTION AND ORDER FIXING RULE FOR NEW TRIAL FOR HEARING

Extract From the Minutes

November Term, 1907

New Orleans, Monday, February 3rd, 1908.
Court met pursuant to adjournment.
Present: Hon. Aleck Boarman, District Judge.

United States
vs. No. 13,261.
Stone, Sand & Gravel Co., et al.

On motion of Rufus E. Foster, United States attorney, it is ordered that the rule for a new trial filed herein be fixed for hearing on Friday, February 7th, 1908, at 11 o'clock A. M.

27 HEARING AND SUBMISSION OF RULE FOR NEW TRIAL.

Extract From the Minutes

November Term, 1907

New Orleans, Friday, February 7th, 1908.
Court met pursuant to adjournment.
Present: Hon. Aleck Boarman, District Judge.

The United States
vs. No. 13,261.
Stone, Sand & Gravel Company, et al.

This cause came on this day to be heard upon the motion of the United States for a new trial herein, and was argued by Rufus E. Foster, United States attorney, for the United States, and by W. B. Spencer, of counsel for the defendants, and submitted—when the Court took time to consider.

ORDER REFUSING NEW TRIAL.

Extract From the Minutes.

April Term, 1908.

New Orleans, Monday, June 1st, 1908.

Court met pursuant to adjournment.

Present: Hon. Aleck Boarman, District Judge.

The United States

vs. No. 13,261.

The Stone, Sand & Gravel Co., et al.

This cause came on at a former day to be heard upon the motion of the United States for a new trial herein, and was argued by counsel for mover and by counsel for the defendants, and submitted to the Court.

Whereupon, the Court having duly considered the same, it is now ordered that the said motion be overruled; that a new trial herein be and the same is hereby refused, and that the verdict of the jury remain undisturbed.

JUDGMENT.

Extract From the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division.

November Term, 1907.

New Orleans, Saturday, January 25th, 1908.

Court met pursuant to adjournment.

Present: Hon. Aleck Boarman, District Judge.

The United States
vs. No. 13,261.
Stone, Sand & Gravel Company
and
The American Surety Company of New York.

By reason of the verdict of the jury rendered herein and in accordance therewith:

It is ordered, adjudged and decreed that there be judgment in favor of the defendants, the Stone, Sand & Gravel Company, and the American Surety Company of New York, rejecting the demand of the plaintiff, the United States, and dismissing this suit with costs.

Judgment rendered January 25, 1908.

Judgment signed June 5, 1908.

(Signed) ALECK BOARMAN,
Judge.

29 MOTION AND ORDER ALLOWING TIME TO PREPARE AND PRESENT BILLS OF EXCEPTION.

Entered and Filed June 1, 1908.
United States Circuit Court, Eastern District of Louisiana.

The United States
vs. No. 13,261.
The Stone, Sand & Gravel Company, et al.

On motion of Rufus E. Foster, United States attorney, it is ordered that he be allowed until the first Monday in November, 1908, in which to prepare and present his bills of exception taken herein.

New Orleans, La., June 1st, 1908.

(Signed) ALECK BOARMAN,
U. S. Judge.

ORDER EXTENDING TIME FOR BILLS OF EXCEPTIONS.

Entered and Filed November 2nd, 1908.

United States
vs. No. 13,261.
Stone, Sand & Gravel Co., et al.

On application of U. S. attorney, representing the plaintiff in the above matter, it is ordered that the time for presenting [and] filing bills of exceptions in the case be extended ten days from this date.

Nov. 2, 1908.

(Signed) ALECK BOARMAN,
Judge.

30 BILL OF EXCEPTIONS.

Filed November 12th, 1908.

United States Circuit Court, Eastern District of Louisiana.

United States
vs. No. 13,261.
Stone, Sand & Gravel Company
and
American Surety Company.

"Bill of Exceptions."

Be it remembered that this case came on for trial in this Court on the twenty-fourth day of January, A. D. 1908, the Honorable Aleck Boarman, United States District Judge, presiding, and the following proceedings were had, to-wit: The jury was empanelled and sworn according to law, and the case was proceeded with, but not completed, and was continued to the day following. That during the progress of said trial plaintiff offered the following documents in evidence, to-wit:

1. Contract between the United States and the Stone, Sand & Gravel Company, entered into June fourteenth, 1900, marked A.

2. Bid and general specifications of the Stone, Sand & Gravel Company, basis of said contract, marked B.

3. Bond signed by the American Surety Company of New York, guaranteeing that the Stone, Sand & Gravel Company would enter into contract in accordance with its bid, marked C.

4. Letter of Brigadier General John M. Wilson, chief of engineers, United States Army, dated February thirteenth, 1900, recommending the cancellation of the said contract between the United States and the Stone, Sand & Gravel Company, together with the indorsements of Elihu Root, secretary of war, dated February fifteen, 1900; James S. Lusk, major corps of engineers, dated February seventeenth, 1900, and
Thomas L. Casey, major corps of engineers, dated
31 March seventh, 1900, marked D.

5. Certified copy, bond of the Stone, Sand & Gravel Company, to the United States, with the American Surety Company of New York, as surety, for seventy-five thousand dollars, in conformity with said contract, marked E.

6. Contract between the United States, and the Atlantic, Gulf & Pacific Company, subsequently entered into for the doing of the same work previously contracted for by the Stone, Sand & Gravel Company, the execution of which contract was admitted by counsel for both defendants.

7. Plaintiff then placed upon the stand as a witness, Mr. Samuel T. Brown, who testified as will more fully appear by the annexed transcript of his testimony, and upon the conclusion of his testimony, an admission was entered of record by counsel for both defendants in the words and figures following, to-wit:

"Without waiving the defenses made by the answers of the defendants, defendants admitted that the government paid, under the contract to the Atlantic, Gulf & Pacific Company, the sum of two hundred, twenty-eight thousand, two hundred and one dollars and ninety-one cents in excess of the amount which they would have paid under the contract with the Stone, Sand & Gravel Company for the same amount of excavation."

The plaintiff rested its case upon the evidence as above set forth, and thereupon defendant, the Stone, Sand & Gravel Company, placed upon the stand as a witness Mr. J. E. Crusel, who testified as appears more fully by the annexed transcript of the stenographer's notes, and in connection with testimony of said witness, said defendant offered the following documents:

1. Letter of Major Casey, dated March seventh, 1900, to Stone, Sand & Gravel Company, marked S. 1.

2. Copy of the answer to above letter, marked S. 2.

3. Telegram, Stone, Sand and Gravel Company to Major Casey, dated January fifteenth, 1900, marked S. 3.

32 4. Telegram from Casey, engineer, to Stone,

Sand and Gravel Company, dated January fifteenth, 1900, marked S. 4.

5. Telegram from Casey, engineer, to Stone, Sand and Gravel Company, dated January seventeenth, 1900, marked S. 5.

6. Letter of Stone, Sand and Gravel Company to Honorable Elihu Root, secretary of war, dated February third, 1900, marked S. 6.

The counsel for both defendants then offered in evidence the following documents:

1. Letter of Stone, Sand and Gravel Company, to Major Willard, marked A. 1.

2. Letter of J. H. Willard, major, corps of engineers, to S. V. Fornaris, president of the Stone, Sand & Gravel Company, dated December eight, 1899, marked A. 2.

3. Letter of Stone, Sand and Gravel Company to Major Willard, dated December eighth, 1899, marked A. 3.

4. Letter of Major Willard, dated December thirteenth, 1899, to Stone, Sand and Gravel Company, marked A. 4.

Defendant, the American Surety Company, then placed on the stand as a witness, Mr. Peter F. Pescud, who testified as more fully appears by the annexed transcript of his testimony.

Counsel for defendants, the American Surety Company of New York, then offered in evidence, and read the annexed depositions of the following witnesses, to-wit:

1. The deposition of H. C. Wilcox.

2. The deposition of Henry D. Lyman.

3. The deposition of Jarvis W. Mason.

Counsel for said defendant, the American Surety Company

of New York, then offered in evidence the following documents:

1. Letter of Thomas L. Casey, major, corps of engineers, dated March seventh, 1900, to the American Surety Company of New York, marked A. 5.

2. Letter of Thos. L. Casey, major, corps of engineers, dated March seventh, 1900, to the Stone, Sand and Gravel Company, marked A. 6.

3. An envelope, marked A. 7.

4. Certified copy of a resolution of the executive committee of the American Surety Company of New York, marked A. 8.

5. Certified copy of resolution of the board of directors of the American Surety Company of New York, marked A. 9.

And with the offer of the above enumerated evidence, oral and written, the case was closed for both plaintiff and defendants, and thereupon counsel for plaintiff moved the Court to direct a verdict in favor of the United States, and against both defendants, as separately prayed for in plaintiff's motion, upon said evidence, which was all the evidence adduced in the case.

And the Court overruled said motion, and declined to direct a verdict as requested, and thereupon counsel for the United States, in the presence of the jury, and before they had retired to deliberate, excepted and still excepts, and annexes to this bill of exceptions a transcript of all the evidence and testimony, both oral and written, adduced before said jury upon the trial of said case, and makes the same a part of this bill of exceptions, and requests the Court to sign this bill of exceptions, and make the same a part of the record, and the same is accordingly done.

Be it further remembered, that upon the conclusion of the taking and offering of evidence in this case by both plaintiff and defendants, counsel for defendant, the Stone, Sand and Gravel Company, moved the Court to direct a verdict in favor of said defendant, and against the United States, upon the evidence adduced before the jury in this case as hereinbefore enumerated, and the Court granted said motion and directed a ver-

dict as requested. And thereupon counsel for the United States, in the presence of the jury, and before they had retired to consider their verdict, excepted, and still excepts, and annexes hereto and makes part of this bill of exceptions, all the evidence, both oral and written, adduced before the jury in this case, as hereinbefore enumerated, and makes the same a part of this bill of exceptions, and asks the Court to
34 sign same, and to make the same a part of the record, and the same is accordingly done.

Be it further remembered, that upon the conclusion of the taking and offering of evidence in this case by both plaintiff and defendants, counsel for defendant, the American Surety Company of New York, moved the Court to direct a verdict in favor of said defendant, and against the United States, upon the evidence adduced before the jury in this case, as hereinbefore enumerated, and the Court granted said motion, and directed a verdict as requested. And thereupon counsel for the United States, in the presence of the jury, and before they had retired to consider their verdict, excepted, and still excepts, and annexes hereto, and makes part of this bill of exceptions, all the evidence, both oral and written, adduced before the jury in this case as hereinbefore enumerated and makes the same a part of this bill of exceptions, and asks the Court to sign same, and to make the same a part of the record, and the same is accordingly done.

And thereafter, counsel for the United States, on February 1st, 1908, filed a motion for a new trial, and on February 7th, 1908, same was argued and submitted.

And thereafter, on June 1st, 1908, the Court overruled said motion for a new trial and granted plaintiff time until November 2nd, A. D. 1908, for the presentation, settlement and signing of bills of exception herein. And thereafter, on November 2nd, A. D. 1908, the Court granted plaintiff a further extension of ten days for the presentation, settlement and signing of bills of exceptions herein.

And now the United States tenders and presents the foregoing as its bill of exceptions in this case for the action of the Court herein, and prays that the same may be settled and allowed and signed by the Court, and made a part of the record, and the same is accordingly done this 12th day of November, A. D. 1908.

(Signed) ALECK BOARMAN, Judge.

The substance of this bill is not objected to, but the right is reserved by defendants to object that the extension granted on Nov. 2, 1908, was unauthorized and granted too late. N. O., Nov. 12, 1908.

(Signed) W. B. SPENCER,
For American Surety Co.
(Signed) T. M. & J. D. MILLER,
Attys. for the Stone, Sand & Gravel Co.

EVIDENCE ADDUCED ON THE TRIAL MADE PART OF BILL OF EXCEPTIONS.

Memorandum.

(This evidence [being that offered on the first trial herein] is omitted, and this memorandum is made, by stipulation of counsel appearing at page 212 of this transcript; the same evidence [except as to the few changes indicated] having been offered at the second trial and appearing at pages 47 to 206 of this transcript.)

PETITION, ORDER AND ASSIGNMENT OF ERRORS.

Filed November 20th, 1908.

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

United States
vs. No. 13,261.
Stone, Sand & Gravel Company
and
American Surety Company of New York.

Now comes the United States, by Rufus E. Foster, United States attorney, duly authorized and directed to appear in this behalf and respectfully shows.

That there is error to its prejudice, and the United States is aggrieved by the verdict of the jury herein and the

judgment entered thereon on the 25th day of January, A. D. 1908, and signed on the 5th day of June, A. D. 1908, and desires to prosecute a writ of error thereto.

Wherefore, the annexed assignment of errors being considered, the petitioner, the United States, prays that it be allowed a writ of error herein, returnable to the Circuit Court of Appeals for the Fifth Circuit, at New Orleans, within thirty days from this date.

That defendants be cited and notified according to law, and further, that the United States be dispensed from giving bond.

(Signed) RUFUS E. FOSTER,
United States Attorney.

ORDER.

Considering the foregoing petition and annexed assignment of errors, it is ordered that the United States be allowed a writ of error herein, returnable to the Circuit Court of Appeals for the Fifth Circuit, at New Orleans, within thirty days from this date, and that citation issue to defendants according to law.

And it is further ordered that the United States be dispensed from giving bond.

New Orleans, November 20, A. D. 1908.

(Signed) ALECK BOARMAN, Judge.

ASSIGNMENT OF ERRORS.

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

United States
vs. No. 13,261.
Stone, Sand & Gravel Company
and

American Surety Company of New York.

And now comes the United States, plaintiff herein, praying

for a writ of error, and assigns the following errors in the proceedings, verdict and judgment herein:

I.

The Court erred in not directing a verdict for plaintiff and against both defendants upon all the evidence and testimony adduced before the jury.

II.

The Court erred in directing a verdict against the plaintiff in favor of defendant, the Stone, Sand & Gravel Company.

III.

The Court erred in directing a verdict against the plaintiff in favor of the American Surety Company of New York.

IV.

The Court erred in overruling plaintiff's motion for a new trial.

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V.

The Court erred in rendering judgment against plaintiff in favor of defendant, the Stone, Sand & Gravel Company.

VI.

The Court erred in rendering judgment against plaintiff in favor of defendant, the American Surety Company of New York.

For these and other errors apparent on the face of the record, the United States prays that the verdict herein be set aside and judgment reversed. And for such further and general relief as this Honorable Court may be pleased to grant.

(Signed) RUFUS E. FOSTER,
United States Attorney.

MANDATE OF UNITED STATES CIRCUIT COURT OF APPEALS.

Filed December 2, 1910.

United States of America, ss:

The President of the United States of America.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Louisiana.
[Seal]

Greeting:

Whereas, lately in the Circuit Court of the United States for the Eastern District of Louisiana before you, or some of you, in a cause between The United States, plaintiff, and the Stone, Sand & Gravel Company and The American Surety Company of New York, defendants, the following
39 judgment was made and entered, to-wit:

The United States
vs. No. 13,261.
Stone, Sand & Gravel Company
and
The American Surety Company of New York.

By reason of the verdict of the jury rendered herein, and in accordance therewith, it is ordered, adjudged and decreed that there be judgment in favor of the defendants, the Stone, Sand & Gravel Company, and the American Surety Company of New York, rejecting the demand of the plaintiff, the United States, and dismissing this suit with costs.

Judgment rendered January 25, 1908.
Judgment signed June 5, 1908.
(Signed) ALECK BOARMAN, Judge.

as by the inspection of the transcript of record.....
.....of the said Circuit Court which was brought into the United States Circuit Court of Appeals for the Fifth Circuit, by virtue of a writ of error sued out by The United States,

agreeably to the act of Congress .....

.....in such case made and provided, fully and at large appears.

And whereas, in the present term of November in the year of our Lord one thousand nine hundred and nine, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the said transcript of record and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, and this cause remanded to said Circuit Court, with directions to have judgment entered for the plaintiff against the Stone, Sand & Gravel Company and its receivers as such, and the American Surety Company, in solido, in the sum of seventy-five thousand ($75,000.00) dollars, with legal interest from judicial demand, and against the Stone, Sand & Gravel Company and its receivers, as such, in the further sum of one hundred forty-six thousand, nine hundred ninety-five and 22/100 ($146,995.22) dollars, with legal interest from judicial demand, being amount due the plaintiff after allowing the Stone, Sand & Gravel Company a credit of six thousand one hundred six and 60/100 ($6,206.60) dollars for reclamation done by it.

Minn 25, 1910.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause .....

.....as according to right and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness, the Honorable John M. Harlan, senior associate justice of the United States, the 29th day of November in the year of our Lord one thousand nine hundred and ten.

Signed: CHARLES H. LEDNUM,

Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

[illegible] United States Circuit Court of Appeals for the Fifth Circuit. No. 1892. November [illegible] The United States vs. The Stone, Sand & Gravel Company et al. Mandate.

CASE CALLED AND CONTINUED.

Extract From the Minutes.

November Term, 1910.

New Orleans, Wednesday, February 1, 1911.

Court met pursuant to adjournment.

Present: Hon. William I. Grubb, District Judge.

United States
vs. No. 13,261.
Stone, Sand & Gravel Co., et als.

This cause was this day called for trial.

Present: W. J. Waxweiler, Assistant United States Attorney, appearing for the United States;
W. B. Spencer, of counsel for the American Surety Company of New York, one of the defendants.

Whereupon, on motion of counsel, it was ordered that the cause be continued until to-morrow at 10 o'clock A. M., owing to the absence of General T. M. Miller, of counsel for the Stone, Sand & Gravel Company, one of the defendants.

STIPULATION AS TO TRIAL.

Filed February 2, 1911.

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

United States
vs. No. 13,261.
Stone, Sand & Gravel Co., et al.

In view of the absence of T. M. Miller, Esqr., solicitor for Stone, Sand & Gravel Co., one of the defendants, it is agreed

that the trial of the case shall nevertheless proceed to verdict with the understanding that if he shall for any reason request a new trial, the government will consent thereto.

It is further agreed that he may have ten days from this date within which to present such motion and that it may be heard by Judge Foster.

(Signed) W. J. WAGUESPACK,
Asst. U. S. Atty.

(Signed) W. B. SPENCER,
For Am. Surety Co.

CASE RESUMED, JURY EMPANELED, HEARING AND VERDICT.

Extract From the Minutes.

November Term, 1910.
New Orleans, Thursday, February 2, 1911.

Court met pursuant to adjournment.
Present: Hon. William I. Grubb, District Judge.

United States
vs. No. 13,261.
Stone, Sand & Gravel Co., et al.

This cause as continued from yesterday, was this day resumed.

43 Present: W. J. Waguespack, Assistant United States Attorney, appearing for the United States;
W. B. Spencer, of Counsel for the American Surety Company of New York, one of the defendants.
Absent: T. M. Miller, of Counsel for the Stone, Sand & Gravel Company, one of the defendants.

Whereupon, the following named jurors were called and sworn to well and truly try the issue joined herein, to-wit:

1. Bernard Grehan,
2. F. Jordan,
3. Marcel Montreuil,
4. Joseph Burke,
5. George S. Scratchely,
6. E. Moulton.
7. H. F. Lochte,
8. Henry J. Saucier,
9. F. M. Norman,
10. Wm. S. Keenan,
11. Henry Maspero,
12. Charles Dennis.

And the trial was proceeded with.

After hearing the pleadings in the case and the evidence offered on behalf of the plaintiff and defendants, counsel for the American Surety Company of New York, moved the Court to instruct the jury to find a verdict in favor of the defendants, and counsel for the United States also moved the Court to instruct the jury to find a verdict in favor of said United States. Thereupon, the Court refused the motion of defendants and granted the motion of the plaintiff, and instructed the jury to find a verdict in favor of the United States, counsel for the defendants reserving a bill of exceptions to the ruling of the Court.

After hearing the instructions of the Court and under said instructions, the jury did then and there in open court, through their foreman, Geo. Scratchley, render and deliver the following verdict, to-wit:

44 N. O., February 2, 1911.

"We, the jury, find for the United States, plaintiff, and against the Stone, Sand & Gravel Company and I. Hechinger and J. Edward Crusel, receivers of the Stone, Sand & Gravel Company and the American Surety Company of New York, defendants, in solido, in the sum of seventy-five thousand dollars with legal interest from judicial demand and against the said Stone, Sand & Gravel Company and I. Hechinger and J. Edward Crusel, receivers of said Stone, Sand & Gravel Company, defendants in the further sum of one hundred and forty-six thousand nine hundred and fifty-two 91/100 dollars with legal interest from judicial demand.

GEO. SCRATCHLEY, Foreman.

Thereupon, on motion of counsel for the United States, it was ordered that the said verdict be recorded, and it is done accordingly; and it was further ordered that the jury be discharged from further consideration of the cause.

MOTION FOR NEW TRIAL.

Filed February 3, 1911.

In the Circuit Court of the United States for the Eastern District of Louisiana.

The United States
vs. No. 13,261.
The Stone, Sand & Gravel Company.

On motion of defendants' attys. and suggesting to the Court that the Court erred in directing a verdict herein for the plaintiff and secondly that the Court erred in not granting the peremptory charge requested by the defendants, it is ordered that the United States district attorney appear instanter and show cause why the verdict rendered herein should not be set aside and a new trial granted.

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45 ORDER OVERRULING MOTION OF DEFENDANTS FOR A NEW TRIAL, AND ALLOWING TIME TO FILE BILLS OF EXCEPTION.

Extract From the Minutes.

November Term, 1910.

New Orleans, Friday, February 3, 1911.

Court met pursuant to adjournment.
Present: Hon. Rufus E. Foster, District Judge.

United States
vs. No. 13,261.
Stone, Sand & Gravel Co., et als.

This cause coming on this day to be heard upon the motion of defendants for a new trial and now the Court being thereof sufficiently advised doth order that said motion and rule for a new trial be and the same is hereby overruled and denied. And

upon request of defendant's attys. it is ordered that defendants have thirty days within which to prepare, present and file their bills of exception to the several rulings and orders of the Court in said suit.

JUDGMENT.

Extract From the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division.

November Term, 1910.

New Orleans, Thursday, February 2, 1911.

Court met pursuant to adjournment.

Present: Hon. William I. Grubb, District Judge.

United States
vs. No. 13,261.
Stone, Sand & Gravel Co., et als.

By reason of the verdict of the jury herein and in accordance therewith, it is ordered, adjudged and decreed
46 that the plaintiff, the United States, do have and recover of and from the defendants, the Stone, Sand and Gravel Company and I. Hechinger and J. Edward Crusel, receivers of the Stone, Sand and Gravel Company, and the American Surety Company of New York, in solido, the sum of seventy-five thousand ($75,000.00) dollars, with legal interest from judicial demand; and from the said Stone, Sand and Gravel Company and I. Hechinger and J. Edward Crusel, receivers of said Stone, Sand and Gravel Company, defendants, the further sum of one hundred and forty-six thousand, nine hundred and fifty-two and 91/100 ($146,952.91) dollars, with legal interest from judicial demand.

It is further ordered and decreed that the defendants pay all costs of suit.

Judgment rendered February 2, 1911.

Judgment signed February 2, 1911.

(Signed) W. I. GRUBB, Judge.

BILL OF EXCEPTIONS.

Filed as of Date July 3, 1911, Nunc Pro Tunc.

In the Circuit Court of the United States for the Eastern District of Louisiana.

The United States
vs. No. 13,261.
The Stone, Sand & Gravel Company and the American Surety Company.

Be it remembered, That, at a regular term of the Court aforesaid, to-wit, on the second day of February, A. D. 1911, this cause came on for trial before the Honorable William I. Grubb, United States District Judge, presiding, when the following proceedings were had, to-wit:

The jury being empaneled and sworn, according to law, and the pleadings being first read to them, the plaintiff
47 offered and introduced in evidence the following documents, to-wit:

Memorandum.

By stipulation of counsel (to be found at page 212 of this transcript) the evidence offered on the first trial was omitted, being identical with the following evidence (including proceedings in relation thereto) except as to changes indicated; the erasures made as to the second trial being shown as erasures, and the additions being shown in italics.

Contract between the United States and the Stone, Sand and Gravel Company, entered into June fourteenth, 1900, marked A. Filed with petition Aug. 31, 1904.

Advertisement.

U. S. Engineer Office.

Vicksburg, Miss., March 2, 1899.

Sealed proposals for excavating 7,500,000 cubic yards of earth, more or less along route for diverting mouth of Yazoo

River near Vicksburg, Miss., under continuous contract, will be received here until 3 o'clock P. M., April 5, 1899. Information furnished on application.

J. H. WILLARD,
Maj., Eng'rs.

Specifications.

General Instructions for Bidders.

1. The attention of bidders is especially invited to the acts of Congress approved February 26, 1885, and February 23, 1887, as printed in Vol. 23, page 332, and Vol. 24, page 414, United States Statutes at Large, which prohibit the importation of foreigners and aliens, under contract or agreement, to perform labor in the United States or Territories or the District of Columbia.

48 2. Preference will be given to articles or materials of domestic production, conditions of quality and price being equal, including in the price of foreign articles the duty thereon.

3. Maps of the localities may be seen at this office. Bidders, or their authorized agents, are expected to visit the place and to make their own estimates of the facilities and difficulties attending the execution of the work, including the uncertainty of weather and all other contingencies.

4. No proposal will be considered unless accompanied by a guaranty in manner and form as directed in these instructions.

5. All bids and guaranties must be made in triplicate, upon printed forms to be obtained at this office. One copy of the guaranty, if given with an individual or individuals as surety, must have an internal revenue stamp, or stamps, of the value of fifty cents affixed; if given with a guaranty company as surety, it must have, in addition to a fifty-cent stamp, a stamp or stamps denoting one-half of one cent on each dollar or fractional part thereof, paid by the principal obligar as a premium.

6. The guaranty attached to each copy of the bid must be signed by two responsible guarantors, to be certified as good and sufficient guarantors by a Judge or clerk of United States Court, United States District Attorney, United States Commissioner, or Judge or clerk of a State court of record, with the seal of said court attached.

7. A firm as such will not be accepted as surety, nor a partner for a co-partner or firm of which he is member. Stockholders who are not officers of a corporation may be accepted as sureties for such corporation. Sureties must be citizens of the United States.

8. Each signature to guaranties and bonds shall have affixed to it an adhesive seal. All signatures to proposals, guaranties, contracts, and bonds should be written out in full, and each signature to guaranties, contracts, and bonds should be attested by at least one witness, and, when practicable, by a separate witness to each signature.

49 9. Each guarantor will justify in the sum of fifty thousand (50,000) dollars. The liability of the guarantors and bidders is determined by the act of March 3, 1883, 22 Statutes, 487, Chap. 120, and is expressed in the guaranty attached to the bid.

10. A proposal by a person who affixes to his signature the word "president," "secretary," "agent," or other designation, without disclosing his principal, is the proposal of the individual. That by a corporation should be signed with the name of the corporation, followed by the signature of the president, secretary, or other person authorized to bind it in the matter, who should file evidence of his authority to do so. That by a firm should be signed with the firm name, by one of the members, giving the names of all members of the firm.

11. The place of residence of every bidder, and post office address, with county and State, must be given after his signature.

12. All prices must be written as well as expressed in figures.

13. One copy each of the advertisement, the instructions for bidders, and the specifications, all of which can be obtained at this office on application by mail or in person, must be securely attached to each copy of the proposal and be considered as comprising a part of it.

14. Proposals must be prepared without assistance from any person employed in or belonging to the military service of the United States or employed under this office.

15. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid, or to whom information in respect to proposals may have been given.

16. Anyone signing the proposal as the agent of another or others must file with it legal evidence of his authority to do so.

17. All blank spaces in the proposal and bond must be filled in, and no change shall be made in the phraseology of the proposal, or addition to the items mentioned therein. Any conditions, limitations, or provisos attached to proposals will be liable to render them informal and cause their rejection.

18. Alterations by erasure or interlineation must be explained or noted in the proposal over the signature of the bidder.

19. If a bidder wishes to withdraw his proposal he may do so before the time fixed for the opening, without prejudice to himself, by communicating his purpose in writing to the officer who holds it, and, when reached, it shall be handed to him or his authorized agent, unread.

20. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

21. No bids received after the time set for opening of proposals will be considered.

22. The proposals and guaranties must be placed in a sealed envelope marked "Proposals for diverting the mouth of Yazoo River," and inclosed in another sealed envelope addressed to Major J. H. Willard, Corps of Engineers, Vicksburg, Miss. The outer envelope must be so indorsed as to indicate before being opened the particular work for which the bid is made.

23. The United States reserves the right to reject any and all bids, and to waive any informality in the bids received, also to disregard the bid of any failing bidder or contractor known as such to the Engineer Department.

24. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount of seventy-five thousand (75,000) dollars, within ten (10) days after being notified of the acceptance of his proposal. One copy of the bond accompanying the contract must have internal revenue stamps affixed, in the same way and to the same value as explained in paragraph 5, above.

25. The contract which the bidders and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in use by the Engineer Department of the Army, blank forms of which can be inspected at this office,
51 and will be furnished if desired to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

26. The sureties are to make and subscribe affidavits of justification on the back of the bond to the contract, and they must jointly justify in double the amount of the penalty.

27. Bidders are invited to be present at the opening of the bids.

General Conditions.

28. A copy of this advertisement, specifications, and instructions will be attached to the contract and form a part of it.

29. The contractor should, within ten days from the award of the contract, furnish the office with the post office address to which communications should be sent.

30. Transfers of contracts, or of interest in contracts, are prohibited by law.

31. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

32. The decision of the engineer officer in charge as to quality and quantity shall be final.

33. It is understood and agreed that the quantities given are approximate only, and it must be understood that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders are expected to examine the drawings, and are invited to make the estimate of quantities for themselves.

34. Should the time for the completion of the contract be extended, all expenses for inspection, and superintendence during the period of the extension, the same to be determined by the engineer officer in charge, shall be deducted from payments due or to become due to the contractor; pro-
52 vided, however, that if the party of the first part shall, in the exercise of his discretion, because of freshets, ice, or other force or violence of the elements, or because of local or State quarantine restrictions, allow the contractor additional time in writing as provided for in the form of contract, there shall be no deduction for the expenses for inspection and superintendence for such additional time so allowed; provided further, that nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided for in the form of contract adopted and in use by the Engineer Department of the Army.

Description of the Work.

35. The object of the work is to give a new mouth or outlet

for the various streams forming the Yazoo system of the Mississippi River, which shall be navigable at all seasons of the year, and at the same time to restore the harbor at Vicksburg, Miss.

The project authorized by Congress contemplates excavating about 7,500,000 cubic yards of earth, more or less, along the route selected from the junction of Yazoo River proper with a former bend of Mississippi River (A. D. 1797-1808), about 9.8 miles above the present entrance of the Yazoo into the Mississippi, and following the "wrong end of Old River," cutting through a neck of low land from Old River to Lake Centennial, thence across Lake Centennial around the head of DeSoto Island, and down the former channel of Mississippi River (1876) in front of the City of Vicksburg to deep water in the bend of Mississippi River at Kleinston Landing. The length of the proposed route is as follows:

Old River	2.75 miles
Main Cut	2.97 "
Lake Centennial	1.56 "
Vicksburg Harbor	2.03 "
Total	9.31 "

53 The material excavated from Old River is to be deposited beyond the limits of flow into the channel; that excavated from the main cut between Old River and Lake Centennial is to be used in completing the embankments partly constructed along both sides of the right of way, filling in behind these embankments, filling the lower part of Barnett Lake, and in building a dam to or above low water across Lake Centennial to head of DeSoto Island; and the material taken from the old channel in Lake Centennial and along the Vicksburg front is to be deposited on the line of the dam in Lake Centennial, and upon the continuation of DeSoto Island beyond the limits of flow back into the channel, or beyond said limits in Lake Centennial, as may be directed by the engineer officer in charge.

The zero of the gauge at Kleinston Landing is 66.04 feet above Cairo datum plane, but the lowest stage of record, November 13, 14, 1895, was 6.53 feet below zero, or 59.51 feet Cairo datum. The grade of the excavation, therefore, shall

be so adjusted as to give 3.5 feet depth at the extreme low stage, or about 56 feet Cairo datum at Kleinston, rising gradually for slope to Yazoo River.

The main cut lies between Old River and Lake Centennial, over which portion of the route the right of way has been purchased by the United States, cleared and grubbed, the debris removed, and the excavation carried down to the 30 meter (98.43) feet plane, Cairo datum, between Lake Centennial and Barnett Lake. The bed of Barnett Lake on the right of way is about on the 25 meter (82.02) feet plane, and from its upper end to Old River excavations have been made to depths ranging between 32.5 and 33.25 meters (106.63 and 109.09 feet) above Cairo datum. The main cut is to be of such dimensions of section that it shall be 30 meters (98.43 feet) wide at bottom with slopes of about 1 vertical on 5 horizontal, more or less, depending upon the angles at which it shall be found that the soil will stand. The channel in front of Vicksburg, at and about the elevator and general steamboat landing of former days, (before 1876 and now at high stages), is to be widened sufficiently for large boats to turn by means of lines and small boats by their own engines.

54 The following are the estimated quantities of earth to be excavated along the various portions of the route. These amounts are approximate only, and may be increased or diminished as detailed surveys render necessary:

Old River	28,547	cubic	yards.
Main Cut	4,725,958	"	"
Lake Centennial	768,967	"	"
Vicksburg Harbor	2,012,811	"	"
Total	7,536,283	"	"

All available information in possession of this office will be given upon application. Bidders are expected, however, to satisfy themselves as to the nature of the work to be done, and it will be assumed that proposals are based upon a thorough understanding of its character. Intending bidders are urged to visit the localities of the work, and by personal inspection and inquiry to inform themselves fully as to present and probable future conditions.

36. Borings.—Eleven borings have been made at intervals along the line of the main cut, extending to depths below the proposed grade for bottom. Samples of the borings at various depths, and a profile showing locations, etc., may be seen at this office. The results of the borings indicate that there are no masses of logs or rock underlying the land between Old River and Lake Centennial, and that the material generally is without cohesion and of a character easily removed by hydraulic dredging.

37. Payments.—There is now available for expenditure upon this work the sum of $512,000. A sufficient proportion of this amount will be reserved to make payments for administration, inspection, superintendence, etc., incident to the work, until another appropriation shall be made, and the balance will be applied to payments for excavation. The River and Harbor Act of June 3, 1896, provided for the completion of the work by the following item, viz.:

55 "Improving mouth of Yazoo River and harbor of Vicksburg, Miss.: For the purpose of completing the project of improvement as heretofore adopted and entered upon, in addition to expending the balance on hand, contracts may be entered into by the Secretary of War for such materials and work as may be necessary to complete the same, or said materials may be purchased and work may be done otherwise than by contract, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate $860,000, exclusive of the amount heretofore appropriated."

An appropriation of $350,000 was made by the Sundry Civil Act of June 4, 1897, being part of the funds now available for expenditure, and leaving the sum of $510,000 to be appropriated to complete the project. Of the latter amount a sufficient sum must be reserved to build a levee above highest floods along left bank of Yazoo River and down wrong end of Old River to join the embankment on left bank of the main cut.

Obligations that may be incurred in advance of appropriations are limited by Section 5 of River and Harbor Act of June 3, 1896, as follows:

"Sec. 5. That under the authority to make contracts for

materials and work, under the provisions of this act, in addition to the sums appropriated herein, the Secretary of War shall not obligate the government to pay, in any one fiscal year, beginning July 1, 1897, more than $400,000 upon the said contracts for any one of the works herein placed under the contract system, except as herein otherwise specifically authorized to do; provided any part of the annual allotment herein provided for, not earned and paid for material furnished or work done in one fiscal year, may be paid for material furnished and work done under the contracts in any subsequent fiscal year; provided further, that nothing herein contained shall be so construed as to prevent the Secretary of War from making contracts for the whole or any part of the works placed under the contract system in such manner as may be deemed best, payments, however, to be made as stated in this section."

56 It is expected that Congress will make appropriations, in accordance with the act quoted above, at such times as to permit of uninterrupted payments for the work covered by these specifications, but the contractor must accept this risk; and it is to be distinctly understood and agreed to by him that the United States shall not be liable for any damages, in connection with this contract, held to be due on account of delay of payments under same, from lack of available funds.

When funds are available for expenditure, in excess of the amount to be reserved for administration, inspection, superintendence, etc., payments for work will be made monthly, ten (10) per cent being reserved from each payment until the total amount thus reserved is equal to ten (10) per cent. of the cost of completing the remainder of the contract, as estimated by the engineer officer in charge. When this amount has been retained, no further reservations shall be made from the monthly payments, and at the last monthly payment of each fiscal year such portion of the total amount retained as will then reduce it to ten (10) per cent. of the cost of completing the remainder of the contract, as estimated by the engineer officer in charge, shall be paid to the contractor. Should payments be discontinued for a period of one year, owing to lack of funds, the total amount reserved from previous payments shall be paid to the contractor; it being understood that such payments shall not release the contractor from his obligations, but that his contract and bond are to remain

in full force and virtue, the same as if such reserved percentages had not been paid.

38. Methods of Excavation.—Owing to the great development in methods of excavation, and to encourage ingenuity, no specific methods are prescribed, and they shall be subject to the contractor's orders. But the order in which work shall be pursued; places of beginning and of continuing operations, deposits of material excavated, etc., shall be subject to direction of the engineer officer in charge. Within six (6) months of notice of award of contract, the contractor will be required to have in active operation a plant of a capacity of not less than 260,000 cubic yards per month. But he may begin at an earlier date, provided the plant first put in operation
57 shall have a capacity of not less than 65,000 cubic yards per month.

The work in Lake Centennial and Vicksburg harbor probably will have to be done by dredging; the closure of the "West Pass" of the lake and of the mouth of the harbor, to maintain a favorable stage for operations, shall be done at the most convenient time after beginning work, and the raising of both embankments for that purpose to a height corresponding to about 30 meters 98.43 feet Cairo datum (equivalent to about 32 feet on the Kleinston gauge) shall be completed whenever the stage of water will permit after the full plant shall have been delivered for operations.

39. Measurements.—All measurements are to be in place, and for this purpose permanent benches have been set at frequent intervals along the Vicksburg front, and at 50 meter (164.04 feet) intervals along both sides of the main cut between Old River and Lake Centennial. The benches are lengths of vitrified sewer pipe set in the ground, filled with cement, and numbered. Section marks have been set at each, made of jointed gas pipes, topped with numbered sheet iron squares above high water mark. All of the ground has been carefully sectioned by levels and soundings, except that upon which there may have been deposits since the last survey; but when operations begin a field party will re-level and sound in advance of the work and follow behind it to compute the monthly output. In case it should prove impracticable to make measurements in place for any portions of the work—such as build-

ing temporary dams, closing or filling in low places, or building dams or parts of dams contemplated by the general project, when the stage might compel suspension of excavation along the route selected, etc.—payments may be made to the contractor for hire of his plant, as provided in the next paragraph.

40. Plant.—Bidders will give, in their proposals, descriptions of the plant to be used upon the work, stating names, kinds of machines, condition of same, and capacity per engine hour. Also the price, per engine hour, at which they will hire any of the machines to the United States, fully manned and equipped for service, including fuel and all supplies required for running same, for use upon any portion of
58 the work where it may be considered impracticable to make measurements in place. The United States will not be responsible for the safety of the employees, plant, or materials so hired from the contractor, nor for any damage done by or to them from any source or cause, and the price per engine hour, to be paid by the United States in case of such hire of plant, is to cover all expenses incident thereto.

41. Price Per Cubic Yard.—It is to be understood that the price bid per cubic yard covers all work under these specifications (except for hire of plant as provided for in the preceding paragraph), including excavation of the material and its deposit at such places as may be designated by the engineer officer in charge, or his authorized agents, or any other work necessary to carry out the provisions of these specifications. The surveys having been made and plotted and the estimate prepared in the metric system, that method of measurement will be followed, and reductions will be made on the basis of one cubic meter as the equivalent of 1.308.1000 cubic yards.

42. Extra Work.—Beyond the hire of plant as provided for in paragraph 40, no claim for extra work will be entertained, unless such extra work is done under written instructions of the engineer officer in charge, or his designated agent, and these instuctions must be presented with the claim. No charge shall be made by the contractor for hindrance or delays from any cause whatever in the progress of the work, but such hindrance and delays may entitle him to an extension

of the time allowed for completion of the work, in the discretion of the engineer officer in charge.

43. Engineer Officer in Charge.—It is to be understood that the engineer officer in charge is that officer of the Corps of Engineers, United States Army, who signs the contract in behalf of the United States, or his legal successor.

44. Location of Work.—The engineer officer in charge, or his authorized assistant, shall have the power to designate the exact localities at which operations shall be prosecuted by the contractor; also the proportions of the force and plant that shall be employed at such designated localities.

59 45. Changes of Dimensions.—The United States reserves the right to increase or diminish the dimensions of the cuts during process of excavation, by an increase or decrease of twenty-five (25) per cent. of the total of the approximate quantities.

46. Explanation and Disagreement.—These specifications, if not understood, will be explained by the engineer officer in charge, but if their requirements are willfully disregarded by the contractor, no measurement or estimate upon the work will be made until they are complied with. In case of any doubt or disagreement arising under these specifications, the decision of the engineer officer in charge shall be final, and he shall be the sole referee in such matters.

47. Employees.—The contractor shall insure good order and discipline among his employees, and to that end shall not employ upon any part of the work any person who, in the opinion of the engineer in charge, proves himself to be incompetent or disorderly and shall discharge any such person upon the request of the engineer in charge.

48. Board and Lodging of United States Employees.—Assistant engineers, inspectors, and other persons employed by the United States upon this work, shall, when required, have board and lodging furnished by the contractor at a reasonable price, approved by the engineer officer in charge, and to be paid for by the United States.

49. The contractors shall give the engineer in charge and all United States employees every facility for entering upon the machines for the purpose of taking measurements of the work, or of securing information about the capacity or operation of any of the machines or plant engaged upon it, and any information so obtained shall be open to the inspection of the contractor.

50. The engineer in charge and the contractor may make rules or agreement about the use of auxiliaries, such as towboats, quarter-boats, launches, or other means of transportation to and from the work, use of telephones, passes for visiting, and the like.

60 51. Proposals.—Proposals must be filled out in triplicate in accordance with paragraphs 4-18 of these specifications, care being taken to see that all three copies are literally alike. Bidders should state upon the form hereto appended (1) a price per cubic yard [illegible] material excavated and deposited at places approved by the engineer officer in charge; (2) a description of the plant under their control and that will be available for use on the date fixed for commencement of the work, giving its present location, and the names, kinds of machines, condition of same, capacity per engine hour, and the rates at which each will be hired to the United States for temporary service, if required, in accordance with paragraph 40 of these specifications; and (3) whether the bidders now are or ever have been engaged on any contract or other work similar to that which is proposed, giving the nature and location of the work, the year in which it was done, the manner of its execution, and such other information as will tend to show their ability to prosecute the work required by these specifications vigorously.

Any bid not complying with the above instructions will be rejected.

Proposals for Diverting Mouth of Yazoo River, Miss.

New Orleans, La., April 3rd, 1899.

To Major J. H. Willard,
Corps of Engineers, U. S. Army,
Vicksburg, Miss.

Sir:

In accordance with your advertisement and specifications of March 2, 1899, inviting proposals for diverting mouth of Yazoo River, Miss., and subject to all the conditions and requirements thereof, copies of both of which are hereto attached, and, so far as they relate to this proposal, are made a part of it, we (or) I propose to furnish the necessary plant and to excavate 7,500,000 cubic yards of earth, more or less, along the route selected and to deposit the material so excavated at places approved by the engineer officer in charge, at eight and forty-nine one hundred cents (8.49 cts.) per cubic yard, measured in place; to begin active operations within six months after notice of award of contract, with sufficient force
61 and plant for an output of not less than 260,000 cubic yards per month, which shall be increased within six months from date of beginning to give an output of not less than three hundred and thirty thousand cubic yards of excavation per month, unless the work is interfered with or stopped by floods, storms, epidemics, or other causes beyond control.

It is proposed to use upon the above work the following described plant, viz.:

Name—

Steam Forward Pump and Dredge John Gaston.

Kind of Machine—

Five yard clam shell dredge and twelve-inch centrifugal pump and one twelve-inch centrifugal pump.

Capacity Per Engine Hour—

200 cubic yards for clam drill bucket and 375 cubic yards for pump. 375 cubic yards for pump.

Condition—

Excellent.

Price Per Engine Hour at Which It Will Be Hired to United States—

This plant with two dump screws, 300 cubic yards capacity each, for $10.00 per hour.

If contract is awarded to us the following plant will be added to the above now on hand:

Name—

S. S. & G. Co. No. 4 Pump Boat with one dump screw.
S. S. & G. Co. No. 5 Pump Boat with one dump screw.

Kind of Machine—

Two twelve-inch centrifugal pumps.
Two twelve-inch centrifugal pumps.

Capacity Per Engine Hour—

375 cubic yards per pump (or 750 c. y.)
375 cubic yards per pump (or 750 c. yds.)

62 Condition—

Excellent.
Excellent.

Price Per Engine Hour at Which It Will Be Hired to United States—

$10 00-100 per hour.
$10 00-100 per hour.

Other Appliances.

Tow Boat T. A. Hendricks, 12″ cylinders, 6′ stroke. This boat to be used to handle dump screws. Should the government use her eight hours daily we will charge ($10 00-100) ten 00-100 dollars per hour; if used sixteen hours per day will charge $7 50-100 per hour. We propose to use on this work four dump screws—i. e., two of a capacity of three hundred (300) cubic yards each, and two of a capacity of five hundred cubic yards each.

(These are the dump screws above referred to.)

The plan above described is under my (or) our control and will be available for use upon this work May 15th, 1899. It

is now located at Mobile, Ala., that is the steam tow pump and dredge boat John Gaston.

In the following lines, the bidder will state whether he is now or ever has been engaged on any contract or other work similar to that proposed. If he is now, he will give the nature and location of the work; if he has been, he will give, in addition to the location and nature of the work, the year in which it was done, the manner of its completion, and such other information concerning such work as will tend to show his ability to vigorously prosecute the work required by the accompanying specifications.

We are now engaged in digging a slip for Messrs. Hunter Benn and Co., at Mobile, Ala., which is 400′ long, 110′ wide, 25′ deep; with the material excavated we are making a fill all around of above six feet, extending as far as 300 feet away from slip. This will be completed this month. The man of this company has had an experience of thirty years
63 in dredging work.

We (or) I make this proposal with a full knowledge of the work required, and, if it is accepted, will, after receiving written notice of such acceptance, enter into contract within the time designated in the advertisement, with good and sufficient sureties for the faithful performance thereof.

(Signature) STONE, SAND AND GRAVEL CO.
JOSEPH VANCE HIGBEE,
President.

(Address in full)
205 Cora Building, New Orleans, La.

(Signature) .....

(Address in full).....
.....

(Signed in triplicate)

A true copy:

(Signed) J. H. WILLARD,
Major, Corps of Engineers.
STONE, SAND AND GRAVEL CO.
By L. V. FORMARIZ.
SABASTIAN V. FORMARIZ,
President.

I, the undersigned, do hereby certify that on Friday, April

21st, 1899, there was convened a regular meeting of the Board of Directors of the Stone, Sand and Gravel Company, at the company's office, Room 205, Cora Building, in the City of New Orleans, State of Louisiana.

There were present: Capt. J. V. Higbee, in the chair; Mr. J. Edw. Crusel, and Mr. B. H. Menge.

Absent—Mr. E. Steinhardt.

Three present; one absent; quorum.

The president stated that the first business was the election of a director to fill the vacancy caused by the resignation of Mr. Charles E. Levy; and Mr. S. V. Fornaris was
64 unanimously elected as a director.

Capt. J. V. Higbee announced to the meeting that he desired to resign as president of the company, and he tendered his written resignation. The secretary was directed to spread same on the minutes and said resignation was duly accepted.

The Board of Directors then proceeded to elect a president of the Stone, Sand and Gravel Company, in accordance with Article V. of the charter of the company, which provides that "The Board of Directors shall elect or appoint all the officers, clerks, agents and employees as they may deem proper."

Mr. S. V. Fornaris was unanimously elected as the president of this company.

Mr. Fornaris came forward and announced that he accepted the position of president, and thereupon he took the chair.

I, H. R. Higbee, secretary and custodian of the records of the Stone, Sand and Gravel Company of New Orleans, La., do hereby certify that the foregoing is a true copy from the books of the company, and that the same remains unrevoked and unchanged at this date.

In witness whereof, I have placed my hand and affixed the corporate seal of this company, this the 21st day of June, 1899.

[Seal] (Signed) H. R. HIGBEE.

Secretary of the Stone, Sand and Gravel Company.

I, the undersigned, do hereby certify that at a regular meeting of the Board of Directors of Stone, Sand and Gravel Company, held on May 20th, 1899, at the office of the company, Room 205, Cora Building, in the City of New Orleans, State of Louisiana, the following resolution was unanimously adopted:

"Resolved, That the president, Mr. S. V. Fornaris, be and he is hereby directed and authorized to make a bond for $75,000 under the contract with the United States Government, with some surety company, if this company is awarded the said contract for excavation for diverting the mouth of Yazoo River, near Vicksburg, Miss.

"Be it further resolved, That Mr. S. V. Fornaris
65 be and he is hereby authorized to sign the contract with the United States Government for diverting the mouth of Yazoo River, when the papers are received from the engineer in charge."

I, H. R. Higbee, secretary and custodian of the records of the Stone, Sand and Gravel Company, of New Orleans, La., do hereby certify that the foregoing is a true copy from the books of the company, and that the same remains unrevoked and unchanged at this date.

In witness whereof I have placed my hand and affixed the corporate seal of this company this the 21st day of June, 1899.

[Seal] (Signed) H. R. HIGBEE,
Secretary of the Stone, Sand and Gravel Company.

Form 19.

1. This agreement entered into this fourteenth day of June, eighteen hundred and ninety-nine, between Major Joseph H. Willard, Corps of Engineers, United States Army, of the first part, and the Stone, Sand and Gravel Company of New Orleans, in the Parish of Orleans, State of Louisiana, of the second part, witnesseth, that, in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Major Joseph H. Willard for and in behalf of the United States of America, and the said Stone, Sand and Gravel Company, do covenant and agree to and with each other, as follows:

That the party of the second part shall furnish all labor, plant, and material and do the work required for excavating seven and one-half millions (7,500,000) cubic yards of earth, more or less, along the route selected for diverting mouth of Yazoo River near Vicksburg, Mississippi, at the price of eight and forty-nine one-hundredths cents (8 49-100 cents) per cubic yard; payments to be made therefor in accordance with paragraph thirty-seven (37) of the specifications hereunto attached

and the conditions attached to the next succeeding page of this agreement.

66 The party of the second part agrees to make prompt payments to all persons supplying labor or materials for the prosecution of the work and also to hire their plant to the United States, when required under provisions of paragraph forty (40) of the specifications hereunto attached, at the prices offered in their proposal dated April 3, 1899, a true copy of which is hereunto attached.

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

The said Stone, Sand and Gravel Company shall commence active operation under this contract on or before the fifth day of December, eighteen hundred and ninety-nine (1899), with sufficient force and plant for an output each calendar month of not less than two hundred and sixty thousand (260,000) cubic yards per month, which shall be increased on or before the fifth day of June, nineteen hundred (1900) with sufficient force and plant for an output each calendar month of not less than three hundred and thirty thousand (330,000) cubic yards per month.

Provided, however, that if work shall commence before the date first above written in this paragraph the plant first put in operation shall have an assured capacity of not less than sixty-five thousand (65,000) cubic yards each calendar month, until December 5, 1899, and work shall not begin with less output.

[Written on margin of paper]:

Attached to contract before signature.

STONE, SAND AND GRAVEL CO.

(Signed) By S. V. FORNARIS,

SEBASTIAN V. FORNARIS,

President.

Attached to contract before signature.

(Signed) J. H. WILLARD,

Major, Corps of Engineers.

67 If in any event the party of the second part shall delay or fail to commence with the delivery of the

material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the chief of engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and upon the giving of such notice, all money or reserve percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in Section 3709 of the Revised Statute of the United States; provided, however, that if the party (or parties) of the second part shall by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the
68 contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before

taking effect must be approved by the Secretary of War; provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the chief of engineers.

The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained, shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same.

Payments will be made in accordance with paragraph 37 of the specifications attached to and forming a part of this contract, but, unless the work is stopped or impeded by floods, storms, epidemics, or other causes beyond control, as may be decided by the engineer officer in charge and approved by the chief of engineers, U. S. A., it is agreed
69 that if the total amount excavated up to the end of any calendar month should be found to be less than the total required up to that date by the above stated monthly rates of progress, no payment for work done during that month shall be due, nor shall any future payment become due under this contract until, by increased rate of excavation, it shall appear at the close of some subsequent month that the total excavated

up to that time is equal to the total excavation equired by the terms of this contract.

[Written on margin of paper]:

Attached to contract before signature.

(Signed) J. H. WILLARD,
Major, Corps of Engineers.

Attached to contract before signature.

STONE, SAND AND GRAVEL CO.,
(Signed) By S. V. FORNARIS.
SEBASTIAN V. FORNARIS,
President.

Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferor or the transferee, but : rights of action for any breach of this contract by said Stone, Sand and Gravel Company are reserved to the United States.

No member of, or delegate to, Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom. But this stipulation, so far as it relates to members of or delegates to Congress is not to be construed to extend to this contract.

This contract shall be subject to approval of the chief of engineers, U. S. A.

In witness whereof the parties aforesaid have here-
70 unto placed their hands the date first hereinbefore written.

Witnesses:

WILLIAM W. ROOF as to J. H. WILLARD.
J. EDWARD CRUSEL as to STONE, SAND AND GRAVEL CO.
BERNARD HILLENGER as to By SEBASTIAN V. FORWARD, President.

[Seal]

(Executed in quintuplicate.)

Approved July 12th, 1899.

(Signed) JOHN M. WILSON,
Brig. Gen., Chief of Engineers, U. S. Army.

I do solemnly swear that the copy of contract hereto annexed is an exact copy of a contract made by me personally with.....; that I made the same fairly, without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said....., or any other person; and that the papers accompanying include all those relating to the said contract as required by the statute in such case made and provided.

.....
Corps of Engineers.

Subscribed and sworn to before me this....day of..... 189....

.....
.....

Note—ere add to any contract made with an incorporated company, for its general benefit the following words, viz.: "But this stipulation, so far as it relates to members of or delegates of Congress, is not to be construed to extend to this contract." See Sec. 3740, Revised Statutes.

Note—This affidavit is required only on the quintuplicate copy of contract intended for the returns office, Department of Interior—A. R. 556.

71 Note.—The copy of contract for the bureau must be accompanied with an abstract of the bids, and copy of each bid and advertisement, unless previously furnished.—A. R. 548.

Note.—The name of the principal intended to be bound as party of the second part, whether an individual, a partnership, or a corporation, should be inserted in and signed to the contract. An officer of a corporation, a partner, or an agent signing for the principal should add his name and designation after the word "by" and under the name of the principal; had an agent of the principal or an officer, if the principal be a corporation, should file evidence of his authority.

[On reverse:]

Office, Chief of Engineers, June 26, 1899.
30904 7375
19

War Department.
Form 19.
Authorized April 30, 1896.

Articles of Agreement.

7375.

Entered into June 14, 1899, between Major J. H. Willard, Corps of Engineers, of the one part, and the Stone, Sand & Gravel Co., of the other part, for excavation for diverting mouth of Yazoo River, near Vicksburg, Miss.

3—037 108

Office of the Secretary, Jan. 25, 1900.
390
6

War Department.

[Seal in black ink]:

U. S. Engineer Office. Received June 17, 1899. Vicksburg, Miss.

U. S. Engineer Office. Received June 22, 1899. Vicksburg, Miss.

Recd. back office. Chief of Engrs. Oct. 17, 1900.
72 with Inc. 92.

Recd. back office. Chief of Engrs., Feb. 16, 1900, with Inc. 65.

Bond $75,000.00.

Contract approved July 12, 1899.

Contract and bond sent to auditor for War Department, and three copies with one bond returned to officer July 12, 1899.

To be commenced Dec. 5, 1899.

To be completed as specified 189. . . .

Dec. 2, 1899, contract extended to Jan. 24, 1900, at request of contractor.

. . . . . 189. . . . auditor informed.

30904
30

(Newspaper clipping):

Excavation.—U. S. Engineer Office, Vicksburg, Miss., March 2, 1899.

Sealed proposals for excavating 7,500,000 cubic yards of earth, more or less, along route for diverting mouth of Yazoo River, near Vicksburg, Miss., under continuous contract, will be received here until 3 o'clock P. M., April 5, 1899. Information furnished on application J. H. Willard, Major Engineers.

Bids and general specifications of the Stone, Sand and Gravel Company, basis of said contract, marked B. Filed with petition Aug. 31, 1904.

Advertisement.

U. S. Engineer Office.

Vicksburg, Miss., March 2, 1899.

Sealed proposals for excavating 7,500,000 cubic yards of earth, more or less, along route for diverting mouth of Yazoo River, near Vicksburg, Miss., under continuous contract, will be received here until 3 o'clock P. M., April 5, 1899.

73 Information furnished on application.

J. H. WILLARD,
Maj., Eng'rs.

Specifications.

General Instruction for Bidders.

1. The attention of bidders is especially invited to the acts of Congress approved February 26, 1885, and February 23, 1887, as printed in vol. 23, page 332, and vol. 24, page 414, United States Statutes at Large, which prohibit the importation of foreigners and aliens under contract or agreement, to perform labor in the United States or Territories or the District of Columbia.

2. Preference will be given to articles or materials of do-

mestic production, conditions of quality and price being equal, including in the price of foreign articles the duty thereon.

3. Maps of the localities may be seen at this office. Bidders, or their authorized agents, are expected to visit the place and make their own estimates of the facilities and difficulties attending the execution of the work, including the uncertainty of weather and all other contingencies.

4. No proposals will be considered unless accompanied by a guaranty in manner and form as directed in these instructions.

5. All bids and guaranties must be made in triplicate, upon printed forms to be obtained at this office. One copy of the guaranty, if given with an individual or individuals as surety, must have an internal revenue stamp, or stamps, of the value of fifty cents affixed; if given with a guaranty company as surety, it must have in addition to a fifty-cent stamp, a stamp or stamps denoting one-half of one cent on each dollar or fractional part thereof, paid by the principal obligor as a premium.

6. The guaranty attached to each copy of the bid must be signed by two responsible guarantors, to be certified as good and sufficient guarantors by a Judge or clerk of
74 United States Court, United States district attorney, United States commissioner, or Judge or clerk of a State court of record, with the seal of said court attached.

7. A firm as such will not be accepted as surety, nor a partner for a co-partner or firm of which he is a member. Stockholders who are not officers of a corporation may be accepted as sureties for such corporation. Sureties must be citizens of the United States.

8. Each signature to guaranties and bonds shall have affixed to it an adhesive seal. All signatures to proposals, guaranties, contracts, and bonds should be written out in full, and each signature to guaranties, contracts, and bonds should be attested by at least one witness, and, when practicable, by a separate witness to each signature.

9. Each guarantor will justify in the sum of fifty thousand (50,000) dollars. The liability of the guarantors and bidders is determined by the act of March 3, 1883, 22 Statutes, 487, Chap. 120, and is expressed in the guaranty attached to the bid.

10. A proposal by a person who affixes to his signature the word "president," "secretary," "agent," or other designation without disclosing his principal, is the proposal of the individual. That by a corporation should be signed with the name of the corporation, followed by the signature of the president, secretary, or other person authorized to bind it in the matter, who should file evidence of his authority to do so. That by a firm should be signed with the firm name, by one of the members, giving the names of all the members of the firm.

11. The place of residence of every bidder, and postoffice address, with county and State, must be given after his signature.

12. All prices must be written as well as expressed in figures.

13. One copy each of the advertisement, the instructions for bidders, and the specifications, all of which can be obtained at this office on application by mail or in person, must be securely attached to each copy of the proposal and be considered as comprising a part of it.

14. Proposals must be prepared without assistance from any person employed in or belonging to the military service of the United States or employed under this office.

15. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid, or to whom information in respect to proposals may have been given.

16. Anyone signing the proposal as the agent of another or others must file with it legal evidence of his authority to do so.

17. All blank spaces in the proposal and bond must be filled in, and no change shall be made in the phraseology of the

proposal, or addition to the items mentioned therein. Any conditions, limitations, or provisos attached to proposals will be liable to render them informal and cause their rejection.

18. Alterations by erasure or interlineation must be explained or noted in the proposal over the signature of the bidder.

19. If a bidder wishes to withdraw his proposal he may do so before the time fixed for the opening, without prejudice to himself, by communicating his purpose in writing to the officer who holds it, and, when reached, it shall be handed to him or his authorized agent, unread.

20. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

21. No bids received after the time set for opening of proposals will be considered.

22. The proposals and guaranties must be placed in a sealed envelope marked "Proposals for diverting mouth of Yazoo River, Miss.," and inclosed in another sealed envelope addressed to Major J. H. Willard, Corps of Engineers, Vicksburg, Miss." The other envelope must be so indorsed as to indicate before being opened the particular work for which the bid is made.

76 23. The United States reserves the right to reject any and all bids, and to waive any informality in the bids received, also to disregard the bid of any failing bidder or contractor known as such to the engineer department.

24. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount of seventy-five thousand (75,000) dollars, within ten (10) days after being notified of the acceptance of his proposal. One copy of the bond accompanying the contract must have internal revenue stamps affixed, in the same way and to the same value as explained in paragraph 5, above.

25. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in use by the engineer department of the army, blank forms of which can be inspected at this office, and will be furnished if desired to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

26. The sureties are to make and subscribe affidavits of justification on the back of the bond to the contract, and they must jointly justify in double the amount of the penalty.

27. Bidders are invited to be present at the opening of the bids.

General Conditions.

28. A copy of this advertisement, specifications, and instructions will be attached to the contract and form a part of it.

29. The contractor should, within ten days from the award of the contract, furnish the office with the postoffice address to which communications should be sent.

30. Transfers of contracts, or of interest in contract, are prohibited by law.

77 31. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

32. The decision of the engineer office in charge as to quality and quantity shall be final.

33. It is understood and agreed that the quantities given are approximate only, and it must be understood that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders are expected to examine the drawings, and are invited to make the estimate of quantities for themselves.

34. Should the time for the completion of the contract be

extended, all expenses for inspection, and superintendence during the period of the extension, the same to be determined by the engineer officer in charge, shall be deducted from payments due or to become due to the contractor; provided, however, that if the party of the first part shall, in the exercise of his discretion, because of freshets, ice, or other force or violence of the elements, or because of local or State quarantine restrictions, allow the contractor additional time in writing as provided for in the form of contract, there shall be no deduction for the expenses for inspection and superintendence for such additional time so allowed; provided further, that nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided for in the form of contract adopted and in use by the engineer department of the army.

Description of the Work.

35. The object of the work is to give a new mouth or outlet for the various streams forming the Yazoo system of the Mississippi River, which shall be navigable at all seasons of the year, and at the same time to restore the harbor at Vicksburg, Miss.

The project authorized by Congress contemplates excavating about 7,500,000 cubic yards of earth, more or less, along the route selected from the junction of Yazoo River proper with a former bend of Mississippi River (A. D. 1797-1808), about 9.8 miles above the present entrance of the Yazoo into the Mississippi, and following the "wrong end of Old River," cutting through a neck of low land from Old River to Lake Centennial, thence across Lake Centennial, around the head of DeSoto Island, and down the former channel of Mississippi River (1876) in front of the City of Vicksburg to deep water in the bend of Mississippi River at Kleinston Landing. The length of the proposed route is as follows:

78

Old River	2.75	miles
Main Cut	2.97	"
Lake Centennial	1.56	"
Vicksburg Harbor	2.03	"
Total	9.31	"

The material excavated from Old River is to be deposited beyond the limits of flow into the channel; that excavated from the main cut between Old River and Lake Centennial is to be used in completing the embankments partly constructed along both sides of the right of way, filling in behind these embankments, filling the lower part of Barnett Lake, and in building a dam to or above low water across Lake Centennial to head of DeSoto Island; and the material taken from the old channel in Lake Centennial and along the Vicksburg front is to be deposited on the line of the dam in Lake Centennial, and upon the continuation of DeSoto Island beyond the limits of flow back into the channel, or beyond said limits in Lake Centennial, as may be directed by the engineer officer in charge.

The zero of the gauge at Kleinston Landing is 66.04 feet above Cairo datum plane, but the lowest stage of record, November 13, 14, 1895, was 6.53 feet below zero, or 59.51 feet Cairo datum. The grade of the excavation, therefore, shall be so adjusted as to give 3.5 feet depth at the extreme low stage, or about 56 feet Cairo datum at Kleinston, rising gradually for slope to Yazoo River.

79 The main cut lines between Old River and Lake Centennial, over which portion of the route the right of way has been purchased by the United States, cleared and grubbed, the debris removed, and the excavation carried down to the 30 meter (98.43 feet) plane, Cairo datum, between Lake Centennial and Barnett Lake. The bed of Barnett Lake on the right of way is about on the 25 meter (82.02 feet) plane, and from its upper end to Old River excavations have been made to depths ranging between 32.5 and 33.25 meters (106.63 and 109.09 feet) above Cairo datum. The main cut is to be of such dimensions of section that it shall be 30 meters (98.43 feet) wide at bottom with slopes of about 1 vertical on 3 horizontal, more or less, depending upon the angles at which it shall be found that the soil will stand. The channel in front of Vicksburg, at and about the elevator and general steamboat landing of former days (before 1876 and now at high stages), is to be widened sufficiently for large boats to turn by means of lines and small boats by their own engines.

The following are the estimated quantities of earth to be excavated along the various portions of the route. These amounts

are approximate only, and may be increased or diminished as detailed surveys render necessary:

Old River	28,547	cubic	yards
Main Cut	4,725,958	"	"
Lake Centennial	768,967	"	"
Vicksburg Harbor	2,012,811	"	"
Total	7,536,283	"	"

All available information in possession of this office will be given upon application. Bidders are expected, however, to satisfy themselves as to the nature of the work to be done, and it will be assumed that proposals are based upon a thorough understanding of its character. Intending bidders are urged to visit the localities of the work, and by personal inspection and inquiry to inform themselves fully as to present and probably future conditions.

80 36. Borings.—Eleven borings have been made at intervals along the line of the main cut, extending to depths below the proposed grade for bottom. Samples of the borings at various depths, and a profile showing locations, etc., may be seen at this office. The results of the borings indicate that there are no masses of logs or rock underlying the land between Old River and Lake Centennial, and that the material generally is without cohesion and of a character easily removed by hydraulic dredging.

37. Payments.—There is now available for expenditure upon this work the sum of $512,000. A sufficient proportion of this amount will be reserved to make payments for administration, inspection, superintendence, etc., incident to the work, until another appropriation shall be made, and the balance will be applied to payments for excavation. The river and harbor act of June 3, 1896, provided for completion of the work by the following item, viz:

"Improving mouth of Yazoo River and harbor of Vicksburg, Miss.: For the purpose of completing the project of improvement as heretofore adopted and entered upon, in addition to expending the balance on hand, contracts may be en-

tered into by the secretary of war for such materials and work as may be necessary to complete the same, or said materials may be purchased and work may be done otherwise than by contract, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate $860,000, exclusive of the amount heretofore appropriated."

An appropriation of $350,000 was made by the sundry civil act of June 4, 1897, being part of the funds now available for expenditure, and leaving the sum of $510,000 to be appropriated to complete the project. Of the latter amount a sufficient sum must be reserved to build a levee above highest floods along left bank of Yazoo River and down wrong end of Old River to join the embankment on left bank of the main cut.

Obligations that may be incurred in advance of appropriations are limited by Section 5 of river and harbor act of June 3, 1896, as follows:

81 "Sec. 5. That under the authority to make contracts for material and work, under the provisions of this act, in addition to the sums appropriated herein, the secretary of war shall not obligate the government to pay, in any one fiscal year, beginning July 1, 1897, more than $400,000 upon the said contracts for any one of the works herein placed under the contract system, except as herein otherwise specifically authorized to do: Provided, any part of the annual allotment herein provided for, not earned and paid for material furnished or work done in one fiscal year, may be paid for material furnished and work done under the contracts in any subsequent fiscal year: Provided further, that nothing herein contained shall be so construed as to prevent the secretary of war from making contracts for the whole or any part of the works placed under the contract system in such manner as may be deemed best, payments, however, to be made as stated in this section."

It is expected that Congress will make appropriations, in accordance with the act quoted above, at such times as to permit of uninterrupted payments for the work covered by these specifications, but the contractor must accept this risk; and it is to be distinctly understood and agreed to by him that the United States shall not be liable for any damages, in connec-

tion with this contract, held to be due on account of delay of payments under same, from lack of available funds.

When funds are available for expenditure, in excess of the amount to be reserved for administration, inspection, superintendence, etc., payments for work will be made monthly, ten (10) per cent being reserved from each payment until the total amount thus reserved is equal to ten (10) per cent. of the cost of completing the remainder of the contract, as estimated by the engineer officer in charge. When this amount has been retained, no further reservations shall be made from the monthly payments, and at the last monthly payment of each fiscal year such portion of the total amount retained as will then reduce it to ten (10) per cent. of the cost of completing the remainder of the contract, as estimated by the engineer officer in charge, shall be paid to the contractor.

82 Should payments be discontinued for a period of one year, owing to lack of funds, the toal amount reserved from previous payments shall be paid to the contractor; it being understood that such payments shall not release the contractor from his obligations, but that his contract and bond are to remain in full force and virtue, the same as if such reserved percentages had not been paid.

38. Methods of Excavation.—Owing to the great development in methods of excavation, and to encourage ingenuity, no specific methods are prescribed, and they shall be subject to the contractor's orders. But the order in which work shall be pursued, places of beginning and of continuing operations, deposits of material excavated, etc., shall be subject to direction of the engineer officer in charge. Within six (6) months of notice of award of contract, the contractor will be required to have in active operation a plant of a capacity of not less than 260,000 cubic yards per month. But he may begin at an earlier date, provided the plant first put in operation shall have a capacity of not less than 65,000 cubic yards per month.

The work in Lake Centennial and Vicksburg Harbor probably will have to be done by dredging; the closure of the "West Pass" of the lake and of the mouth of the harbor, to maintain a favorable stage for operations, shall be done at the most convenient time after beginning work, and the raising of both embankments for that purpose to a height corresponding to about 30 meters (98.43 feet Cairo datum equivalent to

about 32 feet on the Kleinston gauge) shall be completed whenever the stage of water will permit after the full plant shall have been delivered for operations.

39. Measurements.—All measurements are to be in place, and for this purpose permanent benches have been set at frequent intervals along the Vicksburg front, and at 50 meter (164.04 feet) intervals along both sides of the main cut between Old River and Lake Centennial. The benches are lengths of vitrified sewer pipe set in the ground, filled with cement, and numbered. Section marks have been set at each, made of jointed gas pipes, topped with numbered sheet iron squares above high water mark. All of the ground has been carefully sectioned by levels and soundings, except that upon
83 which there may have been deposits since the last survey; but when operations begin a field party will relevel and sound in advance of the work and follow behind it to compute the monthly output. In case it should prove impracticable to make measurements in places for any portions of the work,—such as building temporary dams, closing or filling in low places, or building dams or parts of dams contemplated by the general project, when the stage might compel suspension of excavation along the route selected, etc., payments may be made to the contractor for hire of his plant, as provided in the next paragraph.

40. Plant.—Bidders will give, in their proposals, descriptions of the plant to be used upon the work, stating names, kinds of machines, condition of same, and capacity per engine hour. Also the price, per engine hour, at which they will hire any of the machines to the United States, fully manned and equipped for service, including fuel and all supplies required for running same, for use upon any portion of the work where it may be considered impracticable to make measurements in place. The United States will not be responsible for the safety of the employees, plant, or materials so hired from the contractor, nor for any damage done by or to them from any source or cause, and the price per engine hour, to be paid by the United States in case of such hire of plant, is to cover all expenses incident thereto.

41. Price Per Cubic Yard.—It is to be understood that

the price bid per cubic yard covers all work under these specifications, (except for hire of plant as provided for in the preceding paragraph), including excavation of the material and its deposit at such places as may be designated by the engineer officer in charge, or his authorized agents, or any other work necessary to carry out the provisions of these specifications. The surveys having been made and plotted and the estimate prepared in the metric system, that method of measurement will be followed, and reductions will be made on the basis of one cubic meter as the equivalent of 1.308-1000 cubic yards.

42. Extra Work.—Beyond the hire of plant as provided for in paragraph 40, no claim for extra work will be entertained, unless such extra work is done under written
84 instructions of the engineer officer in charge, or his designated agent, and these instructions must be presented with the claim. No charge shall be made by the contractor for hindrance or delays from any cause whatever in the progress of the work, but such hindrance and delays may entitle him to an extension of the time allowed for completion of the work, in the discretion of the engineer officer in charge.

43. Engineer Officer in Charge.—It is to be understood that the Engineer Officer in charge is that officer of the corps of engineers, United States Army, who signs the contract in behalf of the United States, or his legal successor.

44. Location of Work.—The engineer officer in charge, or his authorized assistant, shall have the power to designate the exact localities at which operations shall be prosecuted by the contractor; also the proportions of the force and plant that shall be employed at such designated localities.

45. Changes of Dimensions.—The United States reserves the right to increase or diminish the dimensions of the cuts during process of excavation, by an increase or decrease of twenty-five (25) per cent. of the total of the approximate quantities.

46. Explanation and Disagreement.—These specifications, if not understood, will be explained by the engineer officer in charge, but if their requirements are willfully disregarded by

the contractor, no measurement or estimate upon the work will be made until they are complied with. In case of any doubt or disagreement arising under these specifications, the decision of the engineer officer in charge shall be final, and he shall be the sole referee in such matters.

47. Employees.—The contractor shall insure good order and discipline among his employees, and to that end shall not employ upon any part of the work any person who in the opinion of the engineer in charge, proves himself to be incompetent or disorderly and shall discharge any such person upon the request of the engineer in charge.

48. Board and Lodging of United States Employees.—Assistant engineers, inspectors, and other persons employed by the United States upon this work, shall, when required, have board and lodging furnished by the contractor at a reasonable price, approved by the engineer officer in charge, and to be paid for by the United States.

49. The contractors shall give the engineer in charge and all United States employees every facility for entering upon the machines for the purpose of taking measurements of the work, or of securing information about the capacity or operation of any of the machines or plant engaged upon it, and any information so obtained shall be open to the inspection of the contractor.

50. The engineer in charge and the contractor may make rules or agreement about the use of auxiliaries, such as towboats, quarter-boats, launches, or other means of transportation to and from the work, use of telephones, passes for visiting, and the like.

51. Proposals.—Proposals must be filled out in triplicate in accordance with paragraphs 4-18 of these specifications, care being taken to see that all three copies are literally alike. Bidders should state upon the form hereto appended, (1) a price per cubic yard for material excavated and deposited at places approved by the engineer officer in charge; (2) a description of the plant under their control and that will be available for use on the date fixed for commencement of the work, giving

its present location, and the names, kinds of machines, condition of same, capacity per engine hour, and the rates at which each will be hired to the United States for temporary service, if required, in accordance with paragraph 40 of these specifications; and (3) whether the bidders now are or ever have been engaged on any contract or other work similar to that which is proposed, giving the nature and location of the work the year in which it was done, the manner of its execu-
86 tion, and such other information as will tend to show their ability to prosecute the work required by these specifications vigorously.

Any bid not complying with the above instructions will be rejected.

New Orleans, La., April 4th, 1899.

The undersigned hereby certifies that at a meeting of the board of directors of Stone, Sand and Gravel Company, held at the office of the company, in the City of New Orleans, State of Louisiana, on Monday evening, April 3rd, 1899, the following resolutions were adopted:

The resignation of Mr. Charles E. Levy as president of the Stone, Sand & Gravel Company, and member of the board of directors was read, and on motion of Mr. Menge, same was accepted.

Resolved, that a vote of thanks be tendered Mr. Chas. E. Levy for his services as president of this company, during his incumbency in the office.

Election of a president of the Stone, Sand & Gravel Co. being in order, Captain J. V. Higbee was nominated and unanimously elected. Captain Higbee announced to the meeting that he accepted the position.

The question of bidding on the Vicksburg work, "For excavation for diverting mouth of Yazoo River, Miss.," having been discussed, and the estimates of expenses and profits submitted by Captain Higbee, copy of which are hereto attached to these minutes, it was resolved that this company put in a bid, and the following resolution was passed:

Resolved, that this company put in a bid "on proposal for excavation for diverting mouth of Yazoo River, Miss.," on this work at rate of (8.49) eight and forty-one hundred cents per cubic yard.

Further resolved, that the president be authorized to make

necessary arrangements with the American Surety Company, of New York, to furnish bonds necessary to put in bid, and to put in and sign a bid for this company on said work.

In witness whereof I have this day and date above
87 written affixed my signature and the seal of the company.

(Signed) H. R. HIGBEE.
[Seal] Secretary and Treasurer.
Stamp.

State of Louisiana,
Parish of Orleans.

Before me the undersigned notary, this day personally came and appeared Harry Russell Higbee, who being by me first duly sworn according to law, deposes and says that he is secretary and treasurer of the Stone, Sand & Gravel Company, and that the foregoing is a true and correct abstract from the minutes of the board of directors of said company, adopted at their meeting held on the 3rd April, 1899.

(Signed) H. R. HIGBEE.

Sworn to and subscribed before me this 7th day of April, 1899.

(Signed) WM. RENAUDIN,
Not. Pub.

Proposal for Diverting Mouth of Yazoo River, Miss.

New Orleans, La., April 3rd, 1899.

To Major J. H. Willard,
Corps of Engineers, U. S. Army,
Vicksburg, Miss.

Sir:

In accordance with your advertisement and specifications of March 2, 1899, inviting proposals for diverting mouth of Yazoo River, Miss., and subject to all the conditions and requirements thereof, copies of both of which are hereto attached and, so far as they relate to this proposal, are made a part of it, we (or) I propose to furnish the necessary plant and to excavate 7,500,000 cubic yards of earth, more or less, along

88 the route selected and to deposit the material so excavated at places approved by the engineer officer in charge, at eight and forty-nine one hundred cents (8.49 cts.) per cubic yard, measured in place; to begin active operations within six months after notice of award of contract, with sufficient force and plant for an output of not less than 260,000 cubic yards per month, which shall be increased within six months from date of beginning to give an output of not less than three hundred and thirty thousand cubic yards of excavation per month, unless the work is interfered with or stopped by floods, storms, epidemics, or other causes beyond control.

It is proposed to use upon the above work the following described plant, viz:

Name—
Steam Tow and Pump and Dredge John Gaston.

Kind of Machine—
Five yard clam shell dredge and twelve-inch centrifugal pump and one twelve-inch centrifugal pump.

Capacity Per Engine Hour—
200 cubic yards for clam shell bucket and 375 cubic yards for pump. 375 cubic yards for pump.

Condition—
Excellent.

Price Per Engine Hour at Which It Will Be Hired to United States—
This plant with two dump scows, 300 cubic yards capacity each, for $10.00 per hour.

If contract is awarded to us the following plant will be added to the above now on hand:

Name—
S. S. & G. Co. No. 4 Pump Boat with one dump scow.
S. S. & G. Co. No. 5 Pump Boat with one dump scow.

Kind of Machine—
Two twelve-inch centrifugal pumps.
Two twelve-inch centrifugal pumps.

89 Capacity Per Engine Hour—
375 cubic yards per pump (or 750 cubic yards).
375 cubic yards per pump (or 750 cubic yards).

Condition—
Excellent.
Excellent.

Price Per Engine Hour at Which It Will Be Hired to United States—
$10 00-100 per hour.
$10 00-100 per hour.

Other Appliances.

Towboat T. A. Hendricks, 12″ cylinders, 6′ stroke. This boat to be used to handle dump scows. Should the government use her eight hours daily we will charge ($10 00-100) ten 00-100 dollars per hour; if used sixteen hours per day will charge $7 50-100 per hour. We propose to use on this work for dump scows; i. e., two of a capacity of three hundred (300) cubic yards each and two of a capacity of five hundred cubic yards each.

(These are the dump scows above referred to.)

The plan above described is under my (or) our control and will be available for use upon this work May 15th, 1899. It is now located at Mobile, Ala., that is the steam tow pump and dredgeboat John Gaston.

In the following lines the bidder will state whether he is now or ever has been engaged on any contract or other work similar to that proposed. If he is now, he will give the nature and location of the work; if he has been, he will give, in addition to the location and nature of the work, the year in which it was done, the manner of its completion, and such other information concerning such work as will tend to show his ability to vigorously prosecute the work required by the accompanying specifications.

We are now engaged in digging a slip for Messrs. Hunter

Benn and Co., at Mobile, Ala., which is 400′ long, 110′ wide, 25′ deep; with the material excavated we are making a fill all around of about six feet, extending as far as 300 feet away from slip. This will be completed this month. The manager of this company has had an experience of thirty years in dredging work.

State of Louisiana,
Parish of Orleans.

Be it known that on this the twelfth day of November in the year of our Lord one thousand eight hundred and ninety-eight, and the independence of the United States of America the one hundred and twenty-second, before me, George Covington Preot, a notary public, in and for the Parish of Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared the several persons whose names are hereto subscribed, who declared that availing themselves of the provisions of the laws of this state relative to the organization of corporations, they have contracted and agreed, and do by these presents covenant and agree and bind and obligate themselves as well as such other persons as may hereafter become associated with them, and their successors, to form and constitute a corporation and body politic in law, for the object and purposes and under the agreements and stipulations following, viz:

Article I.

The name and title of said corporation shall be "Stone, Sand and Gravel Company," and under said name it shall have and enjoy all the rights, powers and privileges granted by law to corporations, and it shall exist for a period of ninety-nine years from and after the date hereof, unless sooner dissolved in the manner hereinafter provided for, to contract, sue and be sued; to make and use a corporate seal and the same to break and alter at pleasure; to hold, receive, purchase and convey, as well as mortgage, hypothecate and pledge property, both real and personal; to issue negotiable bonds and notes, to name and appoint such managers, directors, officers and agents and other employees as its interest and convenience may require; and to make and establish such by-laws, rules and regulations for the proper management and regula-

tions of the business of said corporation as may be necessary and proper, and the same to alter or amend at pleasure.

Article II.

The domicile of the said corporation shall be in the City of legal process shall be served upon the president of said corporation, or in the event of his absence from said city, upon the vice president, or its secretary and treasurer.

Article III.

The objects and purposes for which this corporation is created and established and the nature of the business to be carried on by it are declared to [be] for the construction and maintenance of canals, plank roads, bridges, the making and paving of streets, banquetts, or sidewalks, with gravel, stone, brick, or other material, to construct and maintain work or drainage, sewerage and land reclamation; to own, lease or otherwise acquire and open and operate quarries, mines, gravel pits, beds and deposits; to manufacture artificial stones; to improve navigation of rivers, bayous, and other waters; to construct wharves, landing places and facilities for vessels; to construct and maintain and operate dry docks and floating docks, suitable for building and repairing of vessels, and to acquire by purchase, lease, assignment or otherwise, any and all rights, property, material or contracts or rights for construction and operation of public works or works of public improvement, and all contracts with the United States or state governments, or municipal corporations relating to furnishing and supplying stone, sand, gravel and shells taken by this corporation from mines, quarries, beds, pits or banks, or with artificial stone manufactured by this corporation, and to execute and carry on any works of public utility, whether within or without this state; to lease, hire, charter, construct, equip, purchase and maintain and operate for sea and inland navigation, steamships, sail vessels, steamboats, towboats,
92 barges and other water craft of whatever description for the transportation of freight and passengers for hire, from the City of New Orleans to and between points and places on rivers, lakes, bays and other waters of the United States and to ports in foreign countries and places; to con-

struct, charter, purchase, or otherwise acquire and to maintain and operate dredges, scows, floating elevators and pile drivers; to acquire by purchase, lease or otherwise, warehouses, landing places, wharves, yards for stone, sand and gravel, shell, coal, etc., as the business of the company may require, and to acquire by purchase the business and the property of the Stone, Sand and Gravel Company, Limited, and to pay therefor by issuing full-paid stock of this company to the shareholders in said company to the amount of the existing stock of said company, such business and property to be acquired subject to the obligations of said company, which are to be assumed by this company as a part of the price.

Article IV.

The capital stock of said corporation is $150,000, represented by 1500 shares of the par value of $100 each, which capital stock may be increased or decreased in the manner provided for by the laws of this state. Should said stock be increased, the persons holding stock at the time shall each have the right to take shares of the additional or increased stock, proportionate to the number of shares then held and owned by them respectively, within a time to be limited by the board of directors. This corporation shall be a going concern as soon as six (6) shares of the capital stock is subscribed for and the capital stock may be paid for in cash or property received, and must be full paid before the issuance of the certificates therefor. At all elections, each share of stock shall be entitled to one vote, to be voted either by the holder or his proxy.

No share of the capital stock of this corporation shall be transferred except upon the books of the corporation, nor until the certificate of stock shall have been delivered to the corporation and duly cancelled. All certificates of stock shall bear the seal of the corporation and shall be signed by the president and the secretary and treasurer.

93 Article V.

All the powers of said corporation shall be vested in and exercised by a board of directors composed of five persons, who must continuously during their incumbency as directors own and hold at least one share of stock of the said corpora-

tion, said directors to be elected at a general meeting of the stockholders convened for that purpose on the third day of October, 1899, and thereafter to be elected at such a meeting on the first Monday of October of each year. Notice of such meeting shall be published in one of the daily newspapers issued in the City of New Orleans, for the period of ten days, immediately preceding such election. All elections shall be held at the office of the corporation in said city under the supervision of three stockholders to be appointed for that purpose by the board of directors at its last regular meeting preceding the date of such election. The stockholders receiving the highest vote shall be declared elected. The board of directors so elected shall organize within five days after their election and shall continue in office until their successors have been duly elected and installed. Failure to hold elections on the day specified shall not cause or operate a dissolution of the corporation, but the directors shall hold over until their successors are elected, and a meeting shall again be called for such purpose, after the aforesaid notice, without unnecessary delay. Vacancies occurring on the board from any cause whatever, shall be filled by the remaining directors from amongst the stockholders qualified to serve as directors. Three directors shall constitute a quorum. The board of directors, in their discretion, may appoint a general manager and vest him in such power and authority as in their opinion they may deem expedient. Said general manager to serve at the pleasure of the board, and his power and authority may be increased or decreased as the board may see fit to enact. The board of directors shall elect or appoint the officers, clerks, agents and employes as they may deem proper, and the salaries and compensations of such officers, clerks, agents and employees of said corporation shall be fixed from time to time with full power to increase or diminish the same at pleasure. Meet-
94 ings of stockholders not herein provided for shall be called in the manner and upon such notice as may be provided in the by-laws of said corporation. Each board of directors, at its first meeting, shall elect from its members a president and vice president and shall select a secretary and treasurer.

Article VI.

The following persons shall constitute the first board of

directors, and they are invested with all the rights, powers, and duties herein specified, and shall continue in office until their successors are elected and installed, as hereinbefore provided for, to-wit: J. V. Higbee, B. H. Menge, Chas. E. Levy, J. Edw. Crusel and E. Steinhardt, of whom Chas. E. Levy shall be president; B. H. Menge, vice president, and H. R. Higbee, secretary and treasurer.

Article VII.

This act of incorporation may be changed, modified or altered with the assent of three-fourths of the stock represented, and a majority in amount of the entire stock, at any general meeting of the stockholders of said corporation, convened for such purpose, after ten days' previous notice of such meeting shall have been given by advertisement in one of the daily newspapers published in the City of New Orleans, and such changes as shall be made in reference to the capital stock to be made in accordance with the statute of the state bearing on such action.

Article VIII.

No stockholders shall ever be held liable or responsible for the contracts or faults of said corporation in any further sum than the unpaid balance due on the share or shares of stock subscribed for by him; nor shall any mere informality in organization have the effect of rendering this charter null or exposing a stockholder to any liability beyond the amount due on his subscription to the stock.

95 Article IX.

At the expiration of this charter, or if sooner dissolved, the affairs of the company shall be liquidated by three commissioners to be appointed by the board of directors, and such commissioners are hereby vested with full power to sell any and all the assets and property, both real and personal, of the corporation, and convey full and complete title thereto, and shall have full power to do and perform all acts necessary, useful or proper to fully and completely wind up and liquidate its affairs, and distribute its proceeds, if any, among the stock-

holders, and in case of the death of one or more of such commissioners, the survivor or survivors shall continue to act.

Thus done and passed in my office in the City of New Orleans, on the day and in the month and year first above written, and in the presence of James Guyol and John Converse, both of this city, competent witnesses, who have signed these presents with said appearers and me notary after due reading of the whole.

(Originally Signed) J. V. HIGBEE,
And Others,
JAS. GUYOL.
JNO. CONVERSE.
GEO. C. PREOT.
Not. Pub.

I, the undersigned, recorder of mortgages in and for the Parish of Orleans, State of Louisiana, do hereby certify the above and foregoing charter of the "Stone, Sand and Gravel Company," was this day duly recorded in my office in Book 646, Folio . . . .

New Orleans, November 14th, 1898.

(Signed) GEO. GUINAULT, D. R.

I, George Covington Preot, notary public in and for the City of New Orleans, duly qualified, do hereby certify the foregoing to be a true copy of the original act passed
96 before me and of the documents accompanying the same.

New Orleans, November 13th, A. D. 1898.

GEO. C. PREOT,
Notary Public.

The above and foregoing is a true copy of the charter of this company.

New Orleans, La., April 4th, 1899.

(Signed) HARRY RUSSELL HIGBEE.
Secry. & Treasurer.

We (or) I make this proposal with a full knowledge of the work required, and, if it is accepted, will, after receiving written notice of such acceptance, enter into contract within the

time designated in the advertisement, with good and sufficient sureties for the faithful performance thereof.

STONE, SAND & GRAVEL CO.

(Signature.)

JOSEPH VANCE HIGBEE,
President.

(Address in full.)

205 Cora Building, New Orleans, La.

(Signature) .....

(Address in full).....

.....

(4 cancelled U. S. Int. Rev. Stamps.)

Signed in triplicate.)

J. V. Higbee, Pres. B. H. Menge, Vice Pres.
H. R. Higbee, Sec. & Treas.

Stone, Sand and Gravel Company.

Room 205 Cora Building, New Orleans.
P. O. Box 1579.
Telephone No. 11.

New Orleans, La., April 4th, 1889.

The undersigned hereby certifies that at a meeting of the board of directors of the Stone, Sand & Gravel Company, held at the office of the company, in the City of New
97 Orleans, State of Louisiana, on Monday evening, April 3rd, 1899, the following resolution was adopted:

Resolved, that this company put in a bid "on proposal for excavation for diverting mouth of Yazoo River, Miss.," on this work at rate of (8.49) eight and forty-nine one hundred cents per cubic yard.

Further resolved, that the president be authorized to make necessary arrangements with the American Surety Company, of New York, to furnish bonds necessary to put in the bid.

In witness whereof I have this day and date above written affixed my signature and the seal of the company.

(Signed) H. R. HIGBEE,
[Seal] Secretary & Treasurer.

Guaranty to Accompany Proposal.

We, Stone, Sand & Gravel Company of New Orleans, in the County of Orleans and State of Louisiana, and American Surety Co., of New York, in the County of Kings and State of New York, hereby undertake that if the bid of Stone, Sand and Gravel Company herewith accompanying, dated April 3rd, 1899, for excavation for diverting mouth of Yazoo River, Miss., be accepted within sixty days from the date of the opening of proposals therefor, the said bidder, Stone, Sand and Gravel Co., will, within ten (10) days after notice of such acceptance, enter into a contract with the proper officer of the United States to do the work required, at the prices offered by said bid and in accordance with the terms and conditions of the advertisement and specifications inviting said proposals, and will give bond with good and sufficient sureties for the faithful and proper fulfillment of such contract. And we bind ourselves, our heirs, executors, and administrators, jointly and severally, to pay the United States, in case the said bidder shall fail to enter into such contract or give such bond within ten (10) days after said notice of acceptance, the difference in money between the amount of the bid of said bidder on the articles or services so accepted and the amount for which the proper officer of the United States may contract with another party to furnish said articles and services, if the lat-

98 ter amount be in excess of the former.

Given under our hands and seals this fourth day of April, eighteen hundred and ninety-nine (1899).

STONE, SAND & GRAVEL CO.,
[L. S.] JOSEPH VANCE HIGBEE, President.
AMERICAN SURETY CO.,
[L. S.] PETER F. PESCUD, Res. Asst. Secy.

In presence of:

[L. S.] MAX PHELPS, as to AMERICAN SURETY CO. (Affix adhesive seal.)

[L. S.] Seal of STONE, SAND & GRAVEL CO., as to STONE, SAND & GRAVEL CO. (Affix adhesive seal.)

Note.—Affix here revenue stamp, or stamps, on one copy, as required by par. 5 of specifications.

[Seal of American Surety Co. of N. Y.]

(3) Cancelled U. S. Rev. Stamps.)

Chas. E. Levy, Pres. B. Menge, Vice Pres. H. R. Higbee, Sec. & Treas.

Stone, Sand and Gravel Company.

Room 205 Cora Building, New Orleans.
P. O. Box 1579.
Telephone No. 11.

New Orleans, La., April 4th, 1899.

Major J. H. Willard,
Corps Sngineers,
Vicksburg, Miss.

Dear Sir:

American Surety Company has filed its bond with the clerk of the United States District Court, in the City of New Orleans, State of Louisiana. Should you require a cer-
99 tified copy of same, clerk of the court will send it to you upon your requesting it.

Yours truly,
STONE, SAND & GRAVEL CO.,
J. V. HIGBEE, President.

State of Louisiana,
County of Orleans, ss.

I, Peter F. Pescud, Res. Asst. Secretary American Surety Company, one of the guarantors named in the foregoing guaranty, do swear that I am pecuniarily worth the sum of fifty thousand (50,000) dollars, over and above all my debts and liabilities.

PETER F. PESCUD.

Subscribed and sworn to before me this 4th day of April, 1899, at New Orleans, Louisiana.

F. H. MORTIMER,
[Seal] U. S. Commissioner.

State of .....
County of..... ss.

I, ... one of the guarantors named in the foregoing guaranty, do swear that I am pecuniarily worth the sum of fifty thousand (50,000) dollars, over and above all my debts and liabilities.

Subscribed and sworn to before me this.....day of

.....1899, at.....
.....1

I, (2) Frank H. Mortimer, U. S. Commissioner, do hereby certify that the American Surety Co. of New York, Peter F. Pescud, Resident Asst. Secy., the guarantor above named, ...personally known to me, and that, to the best of my knowledge and belief, ...(3) is pecuniarily worth, over and above all his debts and liabilities, the sum stated in the accompanying affidavit subscribed by it, through its
100 Res. Asst. Secy.

FRANK H. MORTIMER,
[Seal] U. S. Commissioner.

I, ..., do hereby certify that ..... the guarantor above named, is personally known to me, and that to the best of my knowledge and belief, he is pecuniarily worth, over and above all his debts and liabilities, the sum stated in the accompanying affidavit subscribed by him.

(1) The oath to be taken before a notary public or some other officer having general authority to administer oaths. If the officer has an official seal it must be affixed, otherwise the proper certificate as to his official character must be furnished.

(2) This certificate to be by a judge or clerk of a United States Court, a United States district attorney, United States commissioner, or a Judge or clerk of a state court of record with the seal of said court attached. If the official can make the certificate as to both sureties, it will not be necessary to fill out the next form below.

(3) He or each.

Indorsed: Office of Chief of Engineers. 30,904. No. 4. May 1. War Department, 1899. Proposal of Stone, Sand & Gravel Co., New Orleans, La., for Excavation for Diverting Mouth of Yazoo River, Miss. Opened at U. S. Engineer Office, Vicksburg, Miss., April 5, 1899. Office of the Secretary, Jan. 25, 1900. 390—3. War Department. Recd. back, Office Chief of Engrs., Feb. 16, 1900. With inc. 65.

Letter of Brigadier Genl. John M. Wilson, Chief of Engineers, United States Army, dated Feb. 13, 1900, etc., together with indorsements, etc., etc., marked "D."

Offered by plaintiff and referred to in bill of exceptions and made part thereof.

Subject: Contract, Yazoo River, Miss.

101 Office of the Chief of Engineers.

United States Army.

Washington, February 13, 1900.

Hon. Elihu Root,
Secretary of War.

Sir:

I have the honor to return herewith three letters, 59, 60 and 61 of E. D. 30,904, relating to the contract of the Stone, Sand & Gravel Company for excavation along the route for diverting the mouth of the Yazoo River, Miss.

The first of these letters is from Gen. Wm. Sooy Smith, consulting engineer, who describes the existing and prospective plant of the company, and claims that it will be more than adequate to complete the work within the time required by the specifications.

The second letter is from Messrs. I. Hechinger and J. Edw. Crusel, receivers of the company, confirming and ratifying the above mentioned letter of the consulting engineer, and asserting the financial ability of the company to command sufficient capital to complete the work. They also assert that if the extension of time asked for is denied, they are entitled to be reimbursed by the government for the alleged actual cost, $20,996.41, of excavating about 76,000 cubic yards of material; and for the amount, $94,116.50, alleged to have been spent for plant.

The third letter signed by Mr. J. Edw. Crusel, secretary and co-receiver of the company, describes its existing and prospective plant, recites its financial ability to carry on the work, and requests that if the extension be not granted, the company be reimbursed for the actual cost, alleged to be $20,996.41, of

work done in excavating 76,000 cubic yards to date, and that the company's bond be cancelled.

These letters involve practically the same matters and may be properly considered together.

1. The description given of the existing plant by the companys' representatives confirms the view taken by this office, that even at this late date the company has failed to
102 provide a plant capable of meeting the demands imposed by the contract.

2. The proposed reimbursement by the United States, if the extension of the contract be denied, of all costs incurred by the company for excavation thus far done, and for plant, is not contemplated by the contract, and is, therefore, not within the jurisdiction of any executive officer. It should be noted that the claim for actual cost of dredging 76,000 cubic yards is more than three times the contract price.

3. These letters also confirm the view that the representatives of this company competed for work out of their class, and have only recently awakened to the magnitude of the task they undertook.

After fully considering the matter set forth in the said letters, I find no reason for changing my recommendation that the extension be not granted, but that the contract be annulled.

Very respectfully,

Your obedient servant,

(Signed) JOHN M. WILSON,

Brig. Gen. Chief of Engineers, U. S. Army.

30904

58

Inclosures 59-61 accompanying.

(On Reverse.)

[Indorsed:] Office of the Secretary, Feb. 14. 390-30. War Department. Office Chief of Engineers, Feb. 16, 30904 —65. War Department. Feb. 13, 1900. Chief of Engineers, return three letters r ing to the contract of the Stone, Sand

& Gravel Co., for excavation along the route for diverting the mouth of Yazoo River, Miss., and states that he finds no reason for changing his recommendation that the extension asked for be not granted, but that the contract be annulled. (In red ink): 7 inches E. D. (3 W. D. pes.), 30904 ines., 5, 13, 15, 16, 19, 27, 31, 33, 35, 38, 41, 43, 45, 47, 49, 57, 59, 61, 103 64, of 30904 accompy. Rec'd. Record Div. War Dept. Feb. 13, 1900. Received bank [back] office chief of engrs. Mar. 10, 1900, inc. 66, accompg.

(On Reverse.)

War Department.
February 15, 1900.

After full consideration of all the statements submitted both orally and in writing on behalf of the Stone, Sand & Gravel Company of New Orleans, in the matter of their contract for diverting the mouth of the Yazoo River near Vicksburg, Miss., the recommendation of the chief of engineers contained in his report of January 25, 1900, that the contract be annulled and the work readvertised, is approved.

(Signed) ELIHU ROOT,
Secretary of War.

[Second Indorsement:] Office Chief of Engineers, U. S. Army. February 17, 1900. Respectfully referred to Major Thomas L. Casey, corps of engineers. Attention is invited to the foregoing indorsement of the secretary of war, and to the second and third paragraphs, page 7, of E. D. 66 of 30904, by which Major Casey will be guided. The within notice of annulment contemplated by the contract will be sent to the contractor and a copy thereof to the surety. A new draft of specifications and application for authority to readvertise the work should be submitted as soon as practicable. These papers to be returned. By command of Brig. Gen. Wilson. (Signed) Jas. S. Lusk, Major, Corps of Engineers. 30904—65. Inclo. 66 accompanying.

[Seal.]

U. S. Engineer Office. Received Feb. 20, 1900, Vicksburg.

[3d Indorsement:] U. S. Engineer Office, Vicksburg, Miss. March 7, 1900. Respectfully returned to the Chief of En-

gineers, U. S. A. In accordance with directions contained in telegram of this date, notice of annulment of contract was sent today to the contractors, and certified copy thereof to the surety. A new draft of specifications and appli-
104 cation for authority to readvertise the work will be submitted as soon as practicable. (Signed) Thos. L. Casey, Major, Corps of Engineers. (1 inclosure.)
Reed. Office Chief of Engrs., Mar. 10, 1900.

CERTIFIED COPY OF BOND OF STONE, SAND & GRAVEL COMPANY, MARKED "E."

Filed with Petition August 31, 1904.

United States of America.
War Department.

Washington, January 11, 1904.

I hereby certify that the four (4) sheets hereto attached are true copies of a bond on file in the office of the auditor for the War Department, Washington, D. C.

(Signed) G. L. GILLESPIE,
Brig. Gen., Chief of Engineers, U. S. Army.

Be it known, that Brig. Gen. G. L. Gillespie, who signed the foregoing certificate, is the chief of engineers, United States Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof, I have hereunto set my hand and caused the seal of the War Department to be affixed, on this twelfth day of January, one thousand nine hundred and four.

(Signed) ROBERT SHAW OLIVER,
[Seal] Asst. Secretary of War.

New Orleans, La., June 16, 1899.

The premium received on the within bond amounts to $375.00, three hundred and seventy-five dollars.

AMERICAN SURETY COMPANY OF NEW YORK,
By PETER F. PESCUD,
Res. Asst. Secty.

105 I, the undersigned, do hereby certify that at a regular meeting of the board of directors of Stone, Sand & Gravel Company, held on May 20th, 1899, at the office of the company, Room 205 Cora Building, in the City of New Orleans, State of Louisiana, the following resolution was unanimously adopted:

"Resolved, that the president, Mr. S. V. Fornaris, be and he is hereby directed and authorized to make a bond for $75,000 under the contract with the United States Government, with some surety company, if this company is awarded the said contract for excavation for diverting the mouth of Yazoo River, near Vicksnbrg, Miss.

"Be it further resolved, that Mr. S. V. Fornaris be and he is hereby authorized to sign the contract with the United States Government for diverting the mouth of Yazoo River when the papers are received from the engineer in charge."

I, H. R. Higbee, secretary and custodian of the records of the Stone, Sand & Gravel Company, of New Orleans, do hereby certify that the foregoing is a true copy from the books of the company, and that the same remains unrevoked and unchanged at this date.

In witness whereof, I have placed my hand and affixed the corporate seal of this company this the 21st day of June, 1899.

[Seal] H. R. HIGBEE,

Secretary of the Stone, Sand & Gravel Company.

I, the undersigned, do hereby certify that on Friday, April 21st, 1899, there was convened a regular meeting of the board of directors of the Stone, Sand & Gravel Company, at the company's office, Room 205, Cora Building, in the City of New Orleans, State of Louisiana. There were present:

Capt. J. V. Higbee, in the chair; Mr. J. Edw. Crusel and Mr. B. H. Menge.

Absent: Mr. E. Steinhardt.

Three present; one absent; quorum.

106 The president stated that the first business was the election of a director to fill the vacancy caused by the resignation of Mr. Charles E. Levy, and Mr. S. V. Fornaris was unanimously elected as a director.

Captain J. V. Higbee announced to the meeting that he de-

sired to resign as president of the company, and he tendered his written resignation. The secretary was directed to spread same on the minutes and said resignation was duly accepted.

The board of directors then proceeded to elect a president of the Stone, Sand & Gravel Company, in accordance with Article V. of the charter of the company, which provides that "The board of directors shall elect or appoint all the officers, clerks, agents and employees as they may deem proper."

Mr. S. V. Fornaris was unanimously elected as the president of this Co.

Mr. S. V. Fornaris came forward and announced that he accepted the position of president, and thereupon he took the chair.

I, H. R. Higbee, secretary and custodian of the records of the Stone, Sand & Gravel Company, of New Orleans, La., do hereby certify that the foregoing is a true copy from the books of the company, and that the same remains unrevoked and unchanged at this date.

In witness whereof, I have placed my hand and affixed the seal of this company this the 21st day of June, 1899.

[Seal] H. R. HIGBEE,

Secretary of the Stone, Sand & Gravel Company.

(No. 100, Form J.)

$2.38 1/2 cents in revenue stamps.

Contractor's Bond (Public Works).

(When both principal and surety are corporations.)

Know all men by these presents, that we, the Stone, Sand & Gravel Company, a corporation existing under the laws of the State of Louisiana, as principal, and American
107 Surety Co. of New York, as surety, are held and bound unto the United States of America in the penal sum of seventy-five thousand (75,000) dollars; to the payment of which sum, well and truly to be made, we bind ourselves, and our successors, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the above-bounden Stone, Sand & Gravel Company has, on the fourteenth day of June, 1899, entered into a contract with the

United States, represented by Major Joseph H. Willard, Corps of Engineers, U. S. Army, for excavating 7,500,000 cubic yards of earth, more or less, along route for diverting mouth of Yazoo River, near Vicksburg, Miss.

Now, therefore, if the above-bounden Stone, Sand & Gravel Company shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions and agreements in and by the said contract agreed and covenanted by said Stone, Sand & Gravel Company, to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue.

In witness whereof, the parties hereto have executed this instrument this fifteenth day of June, 1899, the name and corporate seal of said principal being hereto affixed and these presents duly signed by its (1) president, pursuant to a resolution of its (2) board of directors, passed on the twentieth day of May, 1899, a copy of the record of which is hereto attached; and the name and corporate seal of said surety being hereto affixed and these presents duly signed by its (1) Resident Vice President, pursuant to resolution of its (2) board of trustees, passed on the eighteenth day of January, 1899, a copy of the record of which is on file in the War
108 Department.

[Seal] STONE, SAND & GRAVEL COMPANY.
By SEBASTIAN V. FORNARIS.

Attest:

J. V. HIGBEE,
[Seal] Vice President.

AMERICAN SURETY CO. OF NEW YORK.
By ARTHUR AMBROSE MAGINNIS,
[Seal] Res. Vice Pres.

Attest:

PETER F. PESCUD,
[Seal] Res. Ass't. Sec.

(Executed in duplicate.)

(1) President or officer authorized to sign for the corporation.

(2) The board of directors or other governing body of the corporation.

(3) Here affix the corporate seal.

[Indorsed:] A. S. Co. (No. 100. Form J.) Bond for Fulfillment of Contract with..... Dated ..... 189.... For..... This form authorized by Secretary of War December 14, 1895. (8787—Q. M. G. O.) 3 pl. (Reg. No. 2096—1896—8000.)

CONTRACT BETWEEN THE UNITED STATES AND THE ATLANTIC, GULF & PACIFIC COMPANY.

Filed with Petition August 31, 1904.

Diverting Mouth of Yazoo River, Miss.

Advertisement.

U. S. Engineer Office.

Vicksburg, Miss., May 28, 1900.

Sealed proposals for excavating 7,500,000 cubic yards of earth, more or less, along route for diverting mouth of Yazoo River, near Vicksburg, Miss., will be received here
109 until 3 o'clock P. M., June 28, 1900, and then publicly opened. Information furnished on application.

THOS. L. CASEY,
Major, Engrs.

Specifications.

General Instructions for Bidders.

1. The attention of bidders is especially invited to the acts of Congress approved February 26, 1885, and February 23, 1887, as printed in vol. 23, page 332, and vol. 24, page 414,

United States Statutes at Large, which prohibit the importation of foreigners and aliens, under contract or agreement, to perform labor in the United States or Territories or the District of Columbia.

2. Preference will be given to articles or materials of domestic production, conditions of quality and price being equal, including in the price of foreign articles the duty thereon.

3. Maps of the localities may be seen at this office. Bidders or their authorized agents are expected to visit the place and to make their own estimates of the facilities and difficulties attending the execution of the work, including the uncertainty of weather and all other contingencies.

4. No proposal will be considered unless accompanied by a guaranty which should be in manner and form as directed in these instructions.

5. All bids and guaranties must be made in triplicate, upon printed forms to be obtained at this office. One copy of the guaranty, if given with an individual or individuals as surety, must have internal revenue stamp, or stamps, of the value of fifty cents affixed; if given with a guaranty company as surety, it must have, in addition to a fifty-cent stamp, a stamp or stamps denoting one-half of one cent on each dollar or fractional part thereof, paid by the principal obligor as a premium, and the amount of said premium must be certified to by the guaranty company.

110 6. The guaranty attached to each copy of the bid must be signed by an authorized surety company, or by two responsible guarantors, to be certified as good and sufficient guarantors by a judge or clerk of a United States Court, United States district attorney, United States commissioner, or Judge or clerk of a State Court of Record, with the seal of said Court attached.

7. A firm as such will not be accepted as surety, nor a partner for a co-partner or firm of which he is a member. Stockholders who are not officers of a corporation may be ac-

cepted as sureties for such corporation. Sureties, if individuals, must be citizens of the United States.

8. When the principal, a guarantor, or a surety, is an individual, his signature to a guaranty or bond shall have affixed to it an adhesive seal. Corporate seals will be affixed by corporations, whether principals or sureties. All signatures to proposals, guaranties, contracts and bonds should be written out in full, and each signature to guaranties, contracts and bonds should be attested by at least one witness, and, when practicable, by a separate witness to each signature.

9. Each guarantor will justify in the sum of fifty thousand (50,000) dollars. The liability of the guarantors and bidder is determined by the act of March 3, 1883, 22 Statutes, 487, Chap. 120, and is expressed in the guaranty attached to the bid.

10. A proposal by a person who affixes to his signature the word "president," "secretary," "agent," or other designation, without disclosing his principal, is the proposal of the individual. That by a corporation should be signed with the name of the corporation, followed by the signature of the president, secretary, or other person authorized to bind it in the matter, who should file evidence of his authority to do so. That by a firm should be signed with the firm name, either by a member thereof or by its agent, giving the names of all members of the firm. Anyone signing the proposals as the agent of another or others must file with it legal evidence of his authority to do so.

111 11. The place of residence of every bidder, and postoffice address, with county and state, must be given after his signature.

12. All prices must be written as well as expressed in figures.

13. One copy each of the advertisement, the instructions for bidders, and the specifications, all of which can be obtained at this office on application by mail or in person, must be se-

curely attached to each copy of the proposal, and be considered as comprising a part of it.

14. Proposals must be prepared without assistance from any person employed in or belonging to the military service of the United States or employed under this office.

15. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid, or to whom information in respect to proposals may have been given.

16. All blank spaces in the proposals and bond must be filled in, and no change shall be made in the phraseology of the proposal, or additions to the items mentioned therein. Any conditions, limitations, or provisos attached to proposals will be liable to render them informal and cause their rejection.

17. Alterations by erasure or interlineation must be explained or noted in the proposal over the signature of the bidder.

18. If a bidder wishes to withdraw his proposal he may do so before the time fixed for the opening, without prejudice to himself, by communicating his purpose in writing to the officer who holds it, and, when reached, it shall be handed to him or his authorized agent, unread.

19. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

20. No bids received after the time set for opening of proposals will be considered.

112 21. The proposals and guaranties must be placed in a sealed envelope marked "Proposals for diverting mouth of Yazoo River, Miss., to be opened June 28, 1900," and inclosed in another sealed envelope addressed to Major Thomas L. Casey, Corps of Engineers, Vicksburg, Miss., but otherwise unmarked. It is suggested that the inner envelope be sealed with sealing wax.

22. The United States reserves the right to reject any and all bids, and to waive informality in the bids received; also to disregard the bid of any failing bidder or contractor known as such to the Engineer Department.

23. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount of seventy-five thousand (75,000) dollars, within ten (10) days after being notified of the acceptance of his proposal. One copy of the bond accompanying the contract must have internal revenue stamps affixed in the same way, to the same value, and with a certificate of premium charged, as explained in paragraph 5, above.

24. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in use by the Engineer Department of the army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

25. The sureties, if individuals, are to make and subscribe affidavits of justification on the back of the bond to the contract, and they must justify in amounts which shall aggregate double the amount of the penal sum named in the bond.

26. Bidders are invited to be present at the opening of the bids.

General Conditions.

27. A copy of this advertisement, specifications and instructions will be attached to the contract and form a part of it.

113 28. The contractor should, within ten days from the award of the contract, furnish the office with the postoffice address to which communications should be sent.

29. Transfers of contracts, or of interest in contracts, are prohibited by law.

30. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

31. The decision of the engineer officer in charge as to quality and quantity shall be final.

32. It is understood and agreed that the quantities given are approximate only, and it must be understood that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders are expected to examine the drawings, and are invited to make the estimate of quantities for themselves. It is not expected that the actual quantities will vary more than ten per centum from the estimates.

33. Should the time for the completion of the contract be extended, all expenses for inspection and superintendence during the period of the extension, the same to be determined by the engineer officer in charge, shall be deducted from payments due or to become due to the contractor. Provided, however, that if the party of the first part shall, in the exercise of his discretion, because of local or state quarantine restrictions, freshets, ice, or other force or violence of the elements, allow the contractor additional time in writing as provided for in the form of contract, there shall be no deduction for the expenses for inspection and superintendence for such additional time so allowed: Provided, further, that nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided for in the form of contract adopted and in use by the Engineer Department of the army.

34. The contractor will be required to hold the United States harmless against all claims for the use of any patented article, process or appliance in connection with the
114 contract herein contemplated.

Description of the Work.

35. The objects of the work is to give a new mouth or out-

let for the various streams forming the Yazoo system to the Mississippi River, which shall be navigable at all seasons of the year, and at the same time to restore the harbor at Vicksburg, Miss.

The project authorized by Congress contemplates excavating about 7,500,000 cubic yards of earth, more or less, along the route selected from the junction of Yazoo River proper with the former bend of Mississippi River (A. D. 1797-1808), about 9.8 miles above the present entrance of the Yazoo into the Mississippi, and following the "wrong end of Old River," cutting through a neck of low land from Old River to Lake Centennial, thence across Lake Centennial around the head of DeSoto Island, and down the former channel of Mississippi River (1876) in front of the City of Vicksburg to deep water in the bend of Mississippi River at Kleinston Landing. The length of the proposed route is as follows:

Old River	2.75	miles
Main Cut	2.97	"
Lake Centennial	1.56	"
Vicksburg Harbor	2.03	"
Total	9.31	"

The material excavated from Old River is to be deposited beyond the limits of flow into the channel; that excavated from the main cut between Old River and Lake Centennial is to be used in completing the embankments partly constructed along both sides of the right of way, filling in behind these embankments, filling the lower part of Barnett Lake, and in building a dam to or above low water across Lake Centennial to head of DeSoto Island; and the material taken from the old channel in Lake Centennial and along the Vicksburg front is to be deposited on the line of the dam in Lake Centennial,
115 and upon the continuation of DeSoto Island beyond the limits of flow back into the channel, or beyond said limits in Lake Centennial, as may be directed by the engineer officer in charge.

The zero of the gauge at Kleinston Landing is 66.04 feet above Cairo datum plane, but the lowest stage of record, November 13, 14, 1895, was 6.53 feet below zero, or 59.51 feet Cairo datum. The grade of the excavation, therefore, shall be

so adjusted as to give 3.5 feet depth at the extreme low stage, or about 56 feet Cairo datum, at Kleinston, rising gradually for slope to Yazoo River.

The main cut lies between Old River and Lake Centennial, over which portion of the route the right of way has been purchased by the United States, cleared and grubbed, the debris removed, and the excavation carried down to the 30 meter (98.43) plane, Cairo datum, between Lake Centennial and Barnett Lake. The bed of Barnett Lake on the right of way is about on the 25 meter (82.02 feet) plane, and from its upper end to Old River excavations have been made to depths ranging between 32.5 and 33.25 meters (106.63 and 109.09 feet) above Cairo datum. The main cut is to be of such dimensions of section that it shall be 30 meters (98.43 feet) wide at bottom with slopes of about 1 vertical on 5 horizontal, more or less, depending upon the angles at which it shall be found that the soil will stand. The channel in front of Vicksburg, at and about the elevator and general steamboat landing of former days (before 1876 and now at high stages), is to be widened sufficiently for large boats to turn by means of lines and small boats by their own engines.

The following are the estimated quantities of earth to be excavated along the various portions of the route. These amounts are approximate only, and may be increased or diminished as detailed surveys render necessary.

Old River	28,547	cubic	yards
Main Cut	4,725,958	"	"
Lake Centennial	768,967	"	"
Vicksburg Harbor	2,012,811	"	"
Total	7,536,283	"	"

116 All available information in possession of this office will be given upon application. Bidders are expected, however, to satisfy themselves as to the nature of the work to be done, and it will be assumed that proposals are based upon a thorough understanding of its character. Intending bidders are urged to visit the localities of the work, and by personal inspection and inquiry to inform themselves fully as to present and probable future conditions.

36. Borings.—Eleven borings have been made at intervals along the line of the main cut, extending to depths below the proposed grade for bottom. Samples of the borings at various depths, and a profile showing locations, etc., may be seen at this office. The results of the borings indicate that there are no masses of logs or rock underlying the land between Old River and Lake Centennial, and that the material generally is without cohesion and of a character easily removed by hydraulic dredging.

37. Payments.—There is now available for expenditure upon this work the sum of $490,000. A sufficient proportion of this amount will be reserved to make payments for administration, inspection, superintendence, etc., incident to the work, until another appropriation shall be made, and the balance will be applied to payments for excavation. The river and harbor act of June 3, 1896, provided for completion of the work by the following item, viz:

"Improving mouth of Yazoo River and harbor of Vicksburg, Miss.: For the purpose of completing the project of improvement as heretofore adopted and entered upon, in addition to expending the balance on hand, contracts may be entered into by the secretary of war for such materials and work as may be necessary to complete the same, or said materials may be purchased and work may be done otherwise than by contract, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate $860,000, exclusive of the amount heretofore appropriated."

An appropriation of $350,000 was made by the sundry civil act of June 4, 1897, being part of the funds now available for expenditure, and leaving the sum of $510,000 to be appropriated to complete the project. Of the latter amount a sufficient sum must be reserved to build a levee above highest floods along left bank of Yazoo River and down wrong end of Old River to join the embankment on left bank of the main cut.

117

Obligations that may be incurred in advance of appropriations are limited by Section 5 of river and harbor act of June 3, 1896, as follows:

"Sec. 5. That under the authority to make contracts for materials and work, under the provisions of this act, in addition to the sums appropriated herein, the secretary of war shall not obligate the government to pay, in any one fiscal year, beginning July 1, 1897, more than $400,000 upon the said contracts for any one of the works herein placed under the contract system, except as herein otherwise specifically authorized to do: Provided, any part of the annual allotment herein provided for, not earned and paid for material furnished or work done in one fiscal year, may be paid for material furnished and work done under the contracts in any subsequent fiscal year: Provided further, that nothing herein contained shall be so construed as to prevent the secretary of war from making contracts for the whole or any part of the works placed under the contract system in such manner as may be deemed best, payments, however, to be made as stated in this section."

It is expected that Congress will make appropriations, in accordance with the act quoted above, at such times as to permit of uninterrupted payments for the work covered by these specifications, but the contractor must accept this risk, and it is to be distinctly understood and agreed by him that the United States shall not [be] liable for any damages in connection with this contract, held to be due on account of delay of payments under same, from lack of available funds.

When funds are available for expenditure, in excess of the amount to be reserved for administration, inspection, superintendence, etc., payments for work will be made monthly, ten (10) per cent being reserved from each payment until the total amount thus reserved is equal to ten (10) per cent of the cost of completing the remainder of the contract, as
118 estimated by the engineer officer in charge. When this amount has been retained, no further reservations shall be made from the monthly payments, and at the last monthly payment of each fiscal year such portion of the total amount retained as will then reduce it to ten (10) per cent of the cost of completing the remainder of the contract, as estimated by the engineer officer in charge, shall be paid to the contractor. Should payments be discontinued for a period of one year, owing to lack of funds, the total amount reserved from previous payments shall be paid to the contractor, it

being understood that such payments shall not release the contractor from his obligations, but that his contract and bond are to remain in full force and virtue, the same as if such reserved percentages had not been paid.

38. Methods of Excavation.—Owing to the great development in methods of excavation, and to encourage ingenuity, no specific methods are prescribed, and they shall be subject to the contractor's orders. But the order in which work shall be pursued; places of beginning and of continuing operations, deposits of material excavated, etc., shall be subject to direction of the engineer officer in charge. Within six (6) months of notice of award of contract, the contractor will be required to have in active operation a plant of a capacity of not less than 260,000 cubic yards per month. But he may begin at an earlier date, provided the plant first put in operation shall have a capacity of not less than 65,000 cubic yards per month.

The work in Lake Centennial and Vicksburg harbor probably will have to be done by dredging; the closure of the "West Pass" of the lake end of the mouth of the harbor, to maintain a favorable stage for operations, may be done at the most convenient time after beginning work, and the raising of both embankments for that purpose to a height corresponding to about 30 meters (98.43 feet) Cairo datum, equivalent to about 32 feet on the Kleinston gauge, may be completed whenever the stage of water will permit after the full plant shall have been delivered for operations.

39. Measurements.—All measurements are to be in place, and for this purpose permanent benches have been set at frequent intervals along the Vicksburg front, and at 50
119 meter (164.04 feet) intervals along both sides of the main cut between Old River and Lake Centennial. The benches are lengths of vitrified sewer pipe set in the ground, filled with cement and numbered. Section marks have been set at each, made of jointed gas pipe, topped with numbered sheet iron squares above high water mark. All of the ground has been carefully sectioned by levels and soundings, except that upon which there may have been deposits since the last survey; but when operations begin a field party will relevel and sound in advance of the work and follow behind it to compute the monthly output. In case it should prove impracticable

to make measurements in place for any portions of the work—such as building temporary dams, closing or filling in low places, or building dams or parts of dams contemplated by the general project, when the stage might compel suspension of excavation along the route selected, etc.—payments may be made to the contractor for hire of his plant, as provided in the next paragraph.

40. Plant.—Bidders will give, in their proposals, descriptions of the plant to be used upon the work, stating names, kinds of machines, condition of same, and capacity per engine hour. Also the price, per engine hour, at which they will hire any of the machines to the United States, fully manned and equipped for service, including fuel and all supplies required for running same, for use upon any portion of the work where it may be considered impracticable to make measurements in place. The United States will not be responsible for the safety of the employees, plant or materials so hired from the contractor, nor for any damage done by or to them from any source, or cause, and the price per engine hour, to be paid by the United States in case of such hire of plant, is to cover all expenses incident thereto.

41. Price Per Cubic Yard.—It is to be understood that the price bid per cubic yard covers all work under these specifications (except for hire of plant as provided for in the preceding paragraph), including excavation of the material and its deposit at such places as may be designated by the engineer officer in charge, or his authorized agents, or any other work necessary to carry out the provisions of these specifi-
120 cations. The surveys having been made and plotted and the estimates prepared in the metric system, that method of measurement will be followed, and reductions will be made on the basis of one cubic meter as the equivalent of 1 308-1000 cubic yards.

42. Extra Work.—Beyond the hire of plant as provided for in paragraph 40, no claim for extra work will be entertained, unless such extra work is done under written instructions of the engineer officer in charge, or his designated agent, and these instructions must be presented with claim. No charge shall be made by the contractor for hindrance or delays

from any cause whatever in the progress of the work, but such hindrance and delays may entitle him to an extension of the time allowed for completion of the work, in the discretion of the engineer officer in charge.

43. Engineer Officer in Charge.—It is to be understood that the engineer officer in charge is that officer of the Corps of Engineers, United States Army, who signs the contract in behalf of the United States, or his legal successor.

44. Location of Work.—The engineer officer in charge, or his authorized assistant, shall have the power to designate the exact localities at which operations shall be prosecuted by the contractor; also the proportions of the force and plant that shall be employed at such designated localities.

45. Changes of Dimensions.—The United States reserves the right to increase or diminish the dimensions of the cuts during process of excavation, by an increase or decrease of twenty-five (25) per cent. of the total of the approximate quantities.

46. Explanation and Disagreement.—These specifications, if not understood, will be explained by the engineer officer in charge, but if their requirements are willfully disregarded by the contractor, no measurement or estimate upon the work will be made until they are complied with. In case of any doubt or disagreement arising under these specifications, the decision of the engineer officer in charge shall be final, and he shall be the sole referee in such matters.

121 47. Employees.—The contractor shall insure good order and discipline among his employees, and to that end shall not employ upon any part of the work any person who, in the opinion of the engineer in charge, proves himself to be incompetent or disorderly, and shall discharge any such person upon the request of the engineer in charge.

48. Board and Lodging of United States Employees.—Assistant engineers, inspectors, and other persons employed by the United States upon this work, shall, when required, have board and lodging furnished by the contractor at a reasonable

price, approved by the engineer officer in charge, and to be paid for by the United States.

49. The contractors shall give the engineer in charge and all United States employees every facility for entering upon the machines for the purpose of taking measurements of the work, or of securing information about the capacity or operation of any of the machines or plant engaged upon it, and any information so obtained shall be open to the inspection of the contractor.

50. The engineer in charge and the contractor may make rules or agreement about the use of auxiliaries, such as towboats, quarter-boats, launches or other means of transportation to and from the work, use of telephones, passes for visitors, and the like.

51. Proposals.—Proposals must be filled out in triplicate in accordance with paragraphs 4-17 of these specifications, care being taken to see that all three copies are literally alike. Bidders should state upon the form hereto appended (1) a price per cubic yard for material excavated and deposited at places approved by the engineer officer in charge; (2) a description of the plant under their control and that will be available for use on the date fixed for commencement of the work, giving its present location, and the names, kinds of machines, condition of same, capacity per engine hour, and the rates at which each will be hired to the United States for temporary service, if required, in accordance with paragaph 40 of these specifications; and (3) whether the bidders now are or ever have been engaged on any contract or other work similar to that which is proposed, giving the nature and location of the work, the year in which it was done, the manner of its execution, and such other information as will tend to show their ability to prosecute the work required by these specifications vigorously.

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Any bid not complying with the above instructions will be rejected.

Proposal for Diverting Mouth of Yazoo River, Miss.

New York, N. Y., June 10, 1900.

To Major Thomas L. Casey,
Corps of Engineers, U. S. Army,
Vicksburg, Miss.

Sir:

In accordance with your advertisement and specifications of May 28, 1900, inviting proposals for diverting mouth of Yazoo River, Miss., and subject to all conditions and requirements thereof, copies of both of which are hereto attached, and, so far as they relate to this proposal, are made a part of it, we (or) I propose to furnish the necessary plant and to excavate 7,500,000 cubic yards of earth, more or less, along the route selected, and to deposit the material so excavated at places approved by the engineer officer in charge, at twelve and fourtenth cents (12 4/10 cts.) per cubic yard, measured in place; to begin active operations within six months after notice of award of contract, with sufficient force and plant for an output of not less than 260,000 cubic yards per month, which shall be increased within.....months from date of beginning to give an output of not less than ..... cubic yards of excavation per month, unless the work is interfered with or stopped by floods, storms, epidemics or other causes beyond control.

123 It is proposed to use upon the above work the following described plant, viz:

Name.	Kind of machine.	Capacity per engine hour, cu. yds.	Condition.	Price per engine hour at which it will be hired to United States.
Dredge No. 4.	Hydraulic.	782	A. No. 1.	$40.00

This machine has made an actual run of 17,136 cubic yards in 21 hours and 55 minutes, and is basis of statement of capacity stated herein.

Dredge No. 5.	Hydraulic.	782	A. No. 1.	$40.00

This machine is practically a duplicate of Dredge No. 4.

Or a similar plant may be substituted in place of either of the above.

Other Appliances.

In addition to the above plant we will supply such additional plant as may be required to carry on efficiently the work called for by these specifications.

....
....
....
....
....
....
....

The plant above described is under my (or) our control and will be available for use upon this work Dec. 30th, 1900. It is now located at.....
....

Dredge No. 4 is located near Port Arthur, Texas.
124 Dredge No. 5 is located near Savannah, Ga.

In the following lines the bidder will state whether he is now or ever has been engaged on any contract or other work similar to that proposed. If he is now, he will give the nature and location of the work; if he has been, he will give, in addition to the location and nature of the work, the year in which it was done, the manner of its completion, and such other information concerning such works as will tend to show his ability to vigorously prosecute the work required by the accompanying specifications.

The managers of this company have been engaged in general contract work, harbor improvements, and railroad construction for the past 20 years. The following is a statement of some of the work with the execution of which we have been connected during the past ten years:

Location.	Method.	Cubic Yards.
Kentucky Street Grade, San Francisco, Cal.,	steam shovel	2,000,000
Alameda, Cal., canal for U. S. Government,	steam shovel	600,000
Colusa Co., Cal., irrigation canal,	special design...	2,250,000

Oakland Harbor, Cal., for U. S. Government, hydraulic	4,000,000
Mare Island Navy Yard, Cal., U. S. Government, hydraulic	2,000,000
Boston, Mass., for State of Mass., hydraulic	485,000
St. John's River, Fla., hydraulic	733,000
Washington, D. C., Potomac Flats, U. S., hydraulic	1,400,000
Norfolk, Va., for railroads, hydraulic	400,000
Atlantic City, N. J., for private parties, hydraulic	600,000
Galveston, Texas, for private parties, hydraulic	600,000
Port Arthur, Texas, for private parties, hydraulic	4,800,000
League Island Navy Yard, U. S. Government, hydraulic	1,200,000
State of Washington, various works, hydraulic	800,000
Wilmington, Del., U. S. Government, hydraulic	1,200,000
Savannah, Ga., private and U. S. Government, hydraulic	1,200,000

125 We (or) I make this proposal with a full knowledge of the work required, and, if it is accepted, will, after receiving written notice of such acceptance, enter into contract within the time designated in the advertisement, with good and sufficient sureties for the faithful performance thereof.

[Signature] ATLANTIC, GULF AND PACIFIC CO.
By GEO. W. CATT, Prest.
[Address in full] Park Row Building, New York, N. Y.
[Seal] .....

Attest:
H. S. WOOD, Sec't'y.

A true copy:

[Signature] .....
(Signed) GEO. W. CATT, Prest.
[Address in full] .....
.....

THOS. L. CASEY.
Major, Corps of Engineers.
[Signed in triplicate]

New York, June 18th, 1900.

Extract from the Record of the Atlantic, Gulf & Pacific Company, of the City and County of New York, and State of New York.

At the regular meeting of the Board of Directors of the Atlantic, Gulf & Pacific Company, held at 61 Park Row, New York City, February 23rd, 1900, a quorum being present, the following resolution was duly adopted:

"Resolved, That Geo. W. Catt, president of this company, "be, and he hereby is, made general manager of this com- "pany, and is hereby authorized to sign as president any and "all documents necessary in and about the business of this "company."

Know all men by these presents, that we, Geo. W. Catt, president, and H. S. Wood, secretary, of the above named company, do hereby certify that the foregoing is a true
126 copy from the books of the company.

[Seal] (Signed) GEO. W. CATT,
President of the Atlantic, Gulf & Pacific Company.
(Signed) H. J. WOOD,
Secretary of the Atlantic, Gulf & Pacific Company.

(To be used when the specifications do not call for liquidated damages.)

Form 19a*

1. This agreement entered into this twentieth day of July, nineteen hundred (1900), between Major Thos. L. Casey, Corps of Engineers, United States Army, of the first part, and the Atlantic, Gulf and Pacific Company, a corporation existing under the laws of the State of West Virginia, of Charleston, in the County of Kanawha, State of West Virginia, of the second part, witnesseth, that

2. In conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Major Thos. L. Casey, for and in behalf of the United States of America, and the said Atlantic, Gulf and Pacific Company do covenant and agree to and with each other, as follows:

That the Atlantic, Gulf and Pacific Company shall furnish

all labor, plant and material, and do the work required for excavating seven and one-half millions (7,500,000) cubic yards of earth, more or less, along the route selected for diverting mouth of Yazoo River, near Vicksburg, Mississippi, at the price of twelve and four-tenths (12 4/10) cents per cubic yard, payment for which shall be made in accordance with paragraph thirty-seven (37) of the specifications attached hereto. Also that the said Atlantic, Gulf and Pacific Company shall hire its plant to the United States when required under provisions of paragraph forty (40) of the specifications attached hereto, at the prices offered in the proposal of the said company dated June 10, 1900, a true copy of which is attached hereto.

127 2. All materials furnished and work done under this contract shall, before being accepted, be subject to rigid inspection by an inspector appointed on the part of the government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

3. The said Atlantic, Gulf and Pacific Company shall commence the work herein contracted for within six months (6 mos.) after date of notification of approval by the chief of engineers, U. S. Army, and shall complete the same within thirty (30) months from such date of commencement.

4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein or shall, in the judgment of the engineer in charge, fail to prosecute faithfully, and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the chief of engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or to become due the said party or parties of the second

part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above mentioned sums out of or from the money or reserve percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be
128 authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in Section 3709 of the Revised Statutes of the United States; provided, however, that if the party (or parties) of the second part shall by epidemics, freshets, ice, local or State quarantine restrictions, force or violence of elements, or other unavoidable cause of delay, and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract, such additional time may, with the prior sanction of the chief of engineers, be allowed him or them, in writing, for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

5. It is further expressly understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, the said United States shall have the right to recover from the party of the second part all cost of inspection and superintendence incurred by the said United States during the period of delay,

and also whatever sums may be expended by the party of the first part, in completing the said contract in excess of the price herein stipulated to be paid to the party of the second part for completing the same. And the said party of the first part may deduct or retain all the above mentioned sums out of or from any money or reserve percentage that may be due or become due the party of the second part under this agreement.

6. If, at any time during the prosecution of the work it be found advantageous or necessary to make any change or modification in the project and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War; provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

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7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials, shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the chief of engineers.

8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior in-

spection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold and save the United States harmless from and against all and every demand or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

11. Payments shall be made to the said Atlantic, Gulf and Pacific Company in accordance with paragraph thirty-seven (37) of the specifications attached hereto.

130 12. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferrer or the transferee, but all rights of action for any breach of this contract by said Atlantic, Gulf and Pacific Company are reserved to the United States.

13. No member of or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom. But this stipulation, so far as it relates to members of or delegates to Congress, is not to be construed to extend to this contract.

14. This contract shall be subject to approval of the chief of engineers, U. S. A.

In witness whereof, the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

(Signed) WILLIAM W. ROOT as to

(Signed) THOS. L. CASEY,
Major, Corps of Engineers.

(Signed) H. S. WOOD, Secty., as to ATLANTIC, GULF AND PACIFIC CO.

[Seal] (Signed) By GEO. W. CATT, Prest.

(Executed in quintuplicate.)

Approved August 10, 1900.

(Signed) JOHN M. WILSON,
Brig. Gen. Chief of Engineers, U. S. Army.

I do solemnly swear that the copy of contract hereto annexed is an exact copy of a contract made by me personally with .....; that I made the same fairly, without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said.....
131 .....or any other person; and that the papers accompanying include all those relating to the said contract as required by the statute in such case made and provided.

.....,
....., Corps of Engineers.

Subscribed and sworn to before me, this ..... day of ....., 190....

*Note—Here add to any contract made with an incorporated company for its general benefit the following words, viz.: "But this stipulation, so far as it relates to members of or delegates to Congress, is not to be construed to extend to this contract."—See Sec. 3740, Revised Statutes.

xNote—This affidavit is required only on the quintuplicate copy of contract intended for the returns office, Department of the Interior.—A. R. 556.

Note—The copy of contract for the bureau must be accompanied with an abstract of the bids, and copy of each bid and advertisement, unless previously furnished.—A. R. 548.

Note—The name of the principal intended to be bound as party of the second part, whether an individual, a partnership, or a corporation, should be inserted in and signed to the contract. An officer of a corporation, a partner, or an agent signing for the principal should add his name and designation after the word "by" and under the name of the principal; and an agent of the principal or an officer, if the principal be a corporation, should file evidence of his authority.

[Indorsed on back:]

Office of Chief of Engineers. 7836 35878/14, Aug. 8, 1900. Form 19a. Authorized April 30, 1896. With Amendments to November 22, 1899. War Department. Office of the Secretary. 390/39. 1900. War Department 7836. Articles of Agreement entered into July 20, 1900, between Thos. L. Casey, Corps of Engineers, of the one part, and the Atlantic, Gulf and Pacific Company of the other part, for the excavation for diverting mouth of Yazoo River, near Vicks-
132 burg, Miss. Surety or sureties: John McMullen, San Francisco, Cal., Charles A. Warren, San Francisco, Cal. Recd. back office Chief of Engrs., Oct. 17, 1900, with 30904/92. Ry. 8, Pg. 115. Bond $25,000.00. Contract approved Aug. 10, 1900. Contract and bond sent to Auditor for War Department, and three copies with 1 bond returned to officer Aug. 10, 1900. To be commenced 6 months after notification of app. To be completed in 30 months.

May 21, 1903: Time limit waived by 1st indorsement on 35878/23 (Captain Potter). 10/23/03. here without waiving any of the defenses made by their answers the defendants admitted that the government paid out under this contract to the Atlantic, Gulf and Pacific Company, the sum of two hundred and twenty-eight thousand two hundred and one 91/100 dollars in excess of the amount which would have been paid under the contract with the Stone, Sand and Gravel Company for the same amount of excavation.

Offer—Mr. (Foster) Waguespack:

I offer in evidence on behalf of the United States, contract between the United States and the Stone, Sand & Gravel Co., entered into June 14th, 1899, marked "A."

I also offer in evidence the bid, and general specifications of the Stone, Sand & Gravel Company upon which the said contract is based, particularly the guaranty, accompany-[ing] the proposal in the sum ..... signed by the American Surety Company on the 4th day of April, 1899, marked "B" and "C," respectively.

Objection—Mr. (Bullitt) Spencer:

I do not object to the introduction of the specifications of the contract because they are mentioned in the contract and made a part thereof. I do object to the introduction of the

proposal on the basis of which this contract was afterwards made, and I object to the introduction of the bond of the American Surety Company, which was to guarantee
133 the fact that they would ultimately enter into the contract.

Mr. Miller.

I join in the objections on behalf of the Stone, Sand & Gravel Co.

The Court.

I overrule the objections. And a bill is reserved to defendants.

Offer—Mr. (Foster) Waguespack:

I also offer in evidence letter of Brig. Gen. John M. Wilson, chief of engineers, U. S. Army, dated February 13th, 1900, recommending that the contract between the United States and the Stone, Sand & Gravel Co. be cancelled, together with the indorsements of Elihu Root, Sec. of War, dated February 15th, and the indorsement of James S. Lusk, Major, Corps of Engineers, Feby. 17th, 1900, and the indorsement of Thomas L. Casey, Major, Corps of Engineers, March 7th, 1900, marked "D."

Mr. (Bullitt) Spencer.

I object to this offer.

Mr. Miller.

I join in the objection.

The Court.

Objection overruled and bill reserved.

Offer—Mr. (Foster) Waguespack:

I also offer in evidence a certified copy of the bond of the Stone, Sand & Gravel Company, to the United States with the American Surety Company of New York as surety thereon in the sum of $75,000, which bond is in conformity with the contract just offered, to guarantee same.

134 Offer—Mr. (Foster) Waguespack:

I also offer in evidence the contract between the

United States and the Atlantic Gulf and Pacific Company, subsequently entered into for the doing of the same work previously contracted for by the Stone, Sand & Gravel Co.

Objection—Mr. Bullitt:

That offer we object to on the ground that it differs radically in important matters with the contract which we undertook to guarantee. I object to it on behalf of the American Surety Company.

Mr. Miller.

On behalf of the Stone, Sand & Gravel Company make the same objection, the objection being 1st that the contract between the government and the Stone, Sand & Gravel [Company] had already then been annulled and cancelled, and, 2nd, because the new contract entered into with this Atlantic, Gulf and Pacific Company differs in material particulars from the contract originally made with the Stone, Sand & Gravel Company, being the same differences stated in the answer filed by the American Surety Company.

Mr. (Bullitt) Spencer.

The execution is admitted.

The Court.

The objection is overruled and bills of exception are reserved to both defendants.

SAMUEL T. BROWN, witness sworn and examined on behalf of the United States, testified as follows:

Mr. (Bullitt) Spencer.

I suggest, Mr. Foster, in order to save continued objections, we stipulate that the objection just noted shall apply to the testimony which Mr. Brown is about to give regarding the work under the contract of the Atlantic, Gulf and Pacific Company without specially making it to each and every question. It is so understood?

135

Mr. Foster.

Yes.

Direct Examination.

By Mr. (Foster) Waguespack.

Q. What is your official position?

A. I am chief of the division of account of the auditor in the War Department that handles all of the accounts of the different disbursing officers, contracting officers, of the War Department.

Q. Have you, in your possession, the vouchers showing the amount paid to the Atlantic, Gulf and Pacific Company, under their contract of July 20th, 1900, for diverting the mouth of the Yazoo River?

A. Yes, sir.

Q. Have you compiled the amount paid to this company?

A. Yes, sir.

Q. Do you find, from your examination, that the United States has [paid] the Atlantic, Gulf and Pacific Company $228,201.91?

A. Yes, sir; $228,201.91 in excess of what it would have cost under the contract of the Stone, Sand and Gravel Company.

Cross-Examination.

By Mr. Miller.

Q. Do you know whether the amount of work that would have been performed by the Stone, Sand and Gravel Company if it had executed this contract, was increased or diminished under the new contract that was awarded?

A. Whether the amount of work was increased or diminished; no, sir; I do not.

Q. You don't know anything about that?

136 A. I have not gone into that subject.

Q. You only know there was a given amount of work done, or at least reported to have been done, and the difference between 8.49 cents per cubic yard and the amount charged or allowed to the other company, made up that amount?

A. Yes, sir; makes up that amount.

Q. What knowledge have you about the actual execution of the contract?

A. The only knowledge that I can give you on this, is the signed vouchers, the vouchers that are made up by the en-

gineer officer in charge of the work, and the receipted vouchers for the amount of earth excavated by the cubic yard and the amount in money paid to them for the service performed.

Q. You assume, because certain vouchers were filed in your department and examined by you, that this work was actually done under that contract?

A. These vouchers go through the hands of two or three different persons, and as a rule they are supposed to be correct.

Q. But personally you don't know?

A. Personally, of course, I don't know it, they could be fraudulent and, of course, personally, I would not know it.

Q. The only knowledge you have of any work being done by this company—

A. Is from the papers in this case.

Q. From the papers as you found them?

A. Yes, sir.

Q. Those vouchers all purport to be for yardage excavated?

A. By the cubic yard.

Q. And that is all that appears in them?

A. Nothing in there except—

Mr. Foster.

Let me see one of the vouchers.

Witness.

Yes, sir (hands a voucher to counsel).

Q. Do you know the signatures of any of the persons whose names appear—

A. Yes, sir.

137 Q. Here is a sample of the vouchers. Do you know the signatures of these persons whose names purport to be signed to these vouchers?

A. I am acquainted with those signatures; yes, sir.

Q. Have you ever seen them write?

A. Not Potter; I never saw him, but this one here I have, Thomas L. Casey.

Q. How did you become familiar—

A. For the simple reason I handled his accounts for about eleven years.

Q. Major Casey?

A. Potter's accounts. All these officers, I am familiar with their signatures because as a rule their signatures are

sent to us through the Secretary of War's office and they go on file as a card and we can always tell, as a rule, as well as a man can a person's signature by comparison, we compare the signature on the voucher with the signature on file. I am not an expert in handwriting.

Q. Are you acquainted with the signature of the person who purports to sign as superintendent of the Atlantic, Gulf and Pacific Company?

A. No, sir.

Q. Are you familiar with the signature of Mr. J. C. Thomas, assistant engineer?

A. No, sir.

Q. What about Mr. Potter, you say you are familiar with his signature.

A. Only as I tell you, from handling a great many of his accounts, in that way I am familiar with it.

Q. You never saw him write?

A. No, sir; not Potter.

Q. But you have had occasion to deal with [what] purported to be vouchers signed in that name?

A. Yes, sir.

Q. And therefore assumed that it is the same person?

A. Yes, sir.

Q. But whether or not these documents representing actual work done, your only knowledge rests on the presumption of regularity through the department?

A. Yes, sir; we take these vouchers returned by
138 these army officers as being true and correct.

Q. Do you ever pass upon any vouchers from Savannah, Georgia?

A. I object to answering that question. I don't think that has anything to do with this case.

The Court.

Let me decide that. I see no objection to the question. What personal reason have you for not wanting to answer the question.

Witness.

Because he asks me a question right now I don't know whether I can answer it.

The Court.

Just say you do not know, if you do not know, and you will by telling the ruth.

A. I don't know.

Q. Did you ever pass upon any of Captain Carter's work in Georgia?

A. I can't say that I have.

Q. Are you not aware that a great many vouchers apparently regular, were regular on their face, were passed, through which the government lost a vast amount of money?

A. I can't answer that.

Q. Is it not a matter of notoriety in your department that there were impositions on the government in the case of Captain Carter and Greene and Gaynor under those Georgia contracts amount to hundreds of thousand of dollars?

A. I have heard of such things as that; yes, sir.

Q. Did you have anything to do with the auditing of the accounts against Greene and Gaynor?

A. I never saw any accounts made up by them.

Q. I understand, but accounts against them? Did
139 you ever do that with the vouchers in this case?

A. I can't say that I ever did.

Q. Don't you know, as an attache of that department, that many hundreds of thousands dollars do escape from the treasury through fraudulent vouchers and especially in those Georgia contracts of Greene and Gaynor?

A. I can only tell you that from hearsay.

Q. Is it not a matter of common knowledge in the department?

A. I can't say for myself, I can only tell you I don't know.

Q. Have you ever passed on any vouchers that subsequently turned out to be untrue and fraudulent?

A. I don't remember of doing that either, passing on any of those vouchers.

Q. You have no familiarity with this work of the United States?

A. None, only auditing vouchers.

Q. You have never been down there at Vicksburg?

A. No, sir.

Q. So as a matter of fact, you don't know the amount of yards of earth that were excavated were about 7,000,000?

A. No, sir; only the papers in the case, what we take as evidence.

Mr. Foster.

In view of the extraordinary change of front on behalf of counsel for the defense, I ask that this case go over. The government announces itself surprised. I ask that the case go over one week in order that these officers may be subpoenaed.

Mr. Bullitt.

Without waiving the defenses made by the answers of the defendants, the defendants admit that the government paid under the contract to the Atlantic, Gulf and Pacific Company the sum of $228,201.91 in excess of the amount which they would have paid under the contract with the Stone, Sand & Gravel Co. for the same amount of excavation.

Here the plaintiff rests.

140 J. E. CRUSEL, witness sworn and examined on behalf of the Stone, Sand and Gravel Co., testified as follows:

Direct Examination.

By Mr. Miller.

Q. You live in New Orleans?

A. Yes, sir.

Q. How long have you lived here?

A. Forty-seven years.

Q. Were you connected with the Stone, Sand & Gravel Co. at the time it made the contract which is sued on here with the government?

A. Yes.

Q. In what capacity?

A. Secretary.

Q. Are you familiar with the action taken by the Stone, Sand and Gravel Company in respect to the fulfillment of that contract?

A. I am.

Q. Now, it is stated here and admitted that the Stone, Sand and Gravel Company, had not equipped itself before the 24th of January, 1900, with the requisite capacity to excavate and remove as much as 260,000 cubic yards per month. As a matter of fact did they do any work or had they begun to do any work under that contract?

A. They did do some, 70,000 cubic yards.

Q. In the course of excavation called for by the contract?

A. Yes, sir.

Q. What was the amount of money that you would have been entitled to, if you had been doing it with the capacity required. Is it what is stated in the answer, $6,206.69?

A. Six thousand and some odd dollars for what we did do. Now, we were not required to do anything at all up to January 24th according to the contract.

Q. Still you had the right under the contract to do work with a certain capacity?

A. We had a right to do work, we did not want to do work, but the engineer in charge suggested it, he wanted to become familiar with the soil, and he suggested that we
141 should start in an experimental way to see what there was, and see what could be done and that is how we did that small amount.

Q. Was that all in the course of the work required?

A. Yes, sir.

Q. In other words in the course of the canal that was to connect Lake Centennial with the Yazoo River?

A. Yes, sir.

Q. Did you, or not, get estimates from the government engineers showing that amount of work?

A. I did.

Q. I want to ask you whether or not this company, the Stone, Sand and Gravel Company, had made its financial arrangements or had made any preparations to go on and complete this contract at this price, 8 49/100 cents per cubic yard?

Mr. (Foster) Wagnespack:

I object to that as irrelevant.

The Court.

Objection overruled.

A. We made every arrangement.

Q. Please state whether or not your company, the Stone, Sand and Gravel Company, made any effort with the engineers representing the government to get leave to go on and complete that contract?

A. We made every effort we could. We had several promises that we would be given any extension and the engineers in charge made it a condition that we should raise $75,000 cash money so as to get certain equipment to go ahead with the work.

By Mr. (Foster) Waguespack:

Q. Were these promises in writing or verbal?

A. They were all verbal. And we proceeded to make those arrangements. We got them successfully arranged and employed the men we possibly could find in the entire country to carry on the work, and as we were going along we
142 got word that the engineers in charge were to be changed, Major Willard was to be retired and Major Casey was to come in. Major Casey did not approve of the plans the way they were and should be changed, and we were stopped. He stated that in my presence in the Union National Bank Building to Mr. Fornaris, who was president of our company.

Q. You say you did make the financial arrangements which Major Willard had required your company should make in order to go on with the execution of this contract? How were those arrangements made?

Objection—Mr. (Foster) Waguespack:

I object to that as irrelevant and ask that it be stricken out.

Mr. Miller.

The witness has testified that the plans of the work were changed.

Witness.

I say Mr. Casey did not approve and that the plans should be changed.

The Court.

Were they changed?

Witness.

They were slightly changed, but not as much as he wanted them.

Mr. (Foster) Waguespack.

I object to that as the plans would be the vest evidence. I object first on the ground that it is not set up in the pleading and next on the ground that the plans would be the best evidence and not hearsay testimony of this witness.

The Court.

Objection sustained.

Q. You say Major Casey superseded Major
143 Willard on this work?

A. Yes.

Q. Then after that your dealings were with Major Casey?

A. Yes, sir.

By Mr. (Foster) Waguespack.

Q. Was that before or after the contract was annulled?

By Mr. Miller.

Q. Was that before or after March 7th?

A. It was before March 7th.

Q. When Major Willard had suggested to your company they must raise this amount of money, who were its officers at that time and who were its stockholders and what did they do?

A. You want the full list of stockholders?

Q. No, the leading ones?

A. The leading ones were Mr. S. V. Fornaris, J. H. Menge, Oscar L. Putnam, Charles Godchaux, Frank B. Hayne, J. V. Higbee, who was a practical man in dredging matters, myself, Mr. Hechinger, and a large number of leading men in New Orleans.

Q. You say having provided yourself with means, what arrangements did you make in regard to dredging, if any, in order to carry on this contract?

A. We contracted with the Featherstone Company of Chicago to make at once one of the largest dredge boats known in those days, and to deliver it on board cars at the work at Vicks-

burg, so we could build the dredge right there. We started there and built a hull for that dredge which had to be of immense capacity, the dredge was to be a seven cubic yard scoop dredge. Then, before that time we had undertaken to put up hydraulic pumps on some hulls that we had gotten in there in a hurry so as to start to do some work to see what could be done from a hydraulic standpoint. Then, at the same time we were building mud scows and building different barges there and had accumulated a large amount of material to do all this work with and contracted for a great deal more which did not come forward as quickly as we expected it
144 from the fact that the factories were rushed with work and a great many factories in the United States would not take contracts at all because they had contracts for a year ahead.

Q. Did you have a dredgeboat in the river which you could not get in the lake on account of lack of water?

A. The dredgeboat Vance had a capacity of 3 1/2 cubic yards, which should have cut some 40,000 yards a day, and we had that right there at Vicksburg for months, but the river was so low we could not get it into the work. We urged Major Casey to let us start at the Yazoo end of the canal, but he would not let us do that, claiming that the first high water would sweep the work away.

Q. Please state whether or not the engineer in charge refused to let you proceed with this work after the 24th of Jany., the date of the first contract?

A. He stated positively we would not be allowed to do any work. That if we wanted to do any work we would do it at our own peril.

Q. How long would it have taken your company, with the arrangements it had, financial and otherwise, to have been in a position to carry on that work successfully?

A. We figured at the time, if my memory serves me right, that it would [have] taken some three or four months to have put us in absolute condition necessary.

Q. That was how much per month capacity?

A. I think it was 260,000 cubic yards the first six months.

Q. Then the contract required you to increase it to 300,000 cubic yards?

A. Yes, sir.

Q. Did you have that increase?

A. Yes, sir; we did.

Q. So that you say your company was ready and willing and offered to go on with the work and were refused the right to do it. Is that the fact?

A. Yes, sir.

Q. When was it that you received notice of the annulment of the contract?

A. I believe Major Casey's dispatch to us is dated January 17th, 1900, stating he would recommend an annulment of the contract. Meanwhile we had many interviews
145 and the major was pretty well set in his views about the matter.

By a Juror.

Q. How much time did you have prior to the 24th of December to prepare for that work?

A. We were given six months. The engineers reached that conclusion, that there being no concern in the United States that was fixed so as to execute a contract of that magnitude, that six months would be given to accumulate and get the machinery necessary to start the work and excavate so many cubic yards per month.

By Mr. Spencer.

Q. Did you have any quarantine during that period?

A. We had yellow fever during that period and were shut out of Vicksburg, I think, for eight weeks.

By Mr. Miller.

Q. Who was this man McKinney that you engaged?

A. He was one of the leading dredgeboat men in the United States, who had successfully dredged the Chicago canal dredging through rock, hard-pan and all kinds of stuff.

Q. Please state whether or not your company got Mr. McKinney to make any investigations and report to you on the feasibility of the work?

A. We did get a report from him.

Q. Was it favorable, or not?

A. It was very favorable. It is in our minutes.

Q. Do you remember whether or not the subscription of your stockholders to this $75,000 was based on a report made by Mr. McKinney as a practical dredgeboat man?

A. It was.

Q. I show you a letter dated March 7th, 1900, purporting to be signed by Major Casey, and ask you to examine that and state whether or not your company received that from him and if so when?

A. We did receive that letter (witness examines letter shown to him by counsel) from him, in due course of mail, and it was answered the next day according to this
146 carbon copy here.

Offer—Mr. Miller:

We offer in evidence this letter of Major Casey, dated March 7th, 1900, addressed to the Stone, Sand and Gravel Company, marked Crusel-1.

Q. Who sent that? (Counsel hands witness letter referred to.)

A. I did.

Q. At that date, had, or not, the Stone, Sand and Gravel Company—

Mr. (Bullitt) Spencer.

On the part of the American Surety Company we desire to object to the last letter written by Mr. Crusel to Major Casey, as far as it effects us.

The Court.

Objection overruled and bill reserved.

Q. Who wrote that letter as receiver, or at least where there is a blank space?

A. I wrote all the letters of the company as a rule and signed them. I expect it must have been written and signed by me.

Q. You were one of the receivers of the Stone, Sand and Gravel Co.?

A. Yes, sir.

Q. Under appointment of the Civil District Court here?

A. Yes.

Q. And you were the active receiver?

A. Yes, sir.

Q. Mr. Hechinger was associated with you?

A. Yes, sir. As co-receiver.

Q. Do you remember whether or not you received any communication from Major Casey, either telegraphic or otherwise, prior to that date, stating he would not grant any extension or would recommend that no extension be granted
147 and would recommend the cancellation of the contract?

A. We did receive a telegram, I think the date was January 17th, 1900.

Mr (Foster) Waguespack.

The telegram speaks for itself. I object to any verbal evidence regarding its contents.

Q. Examine these two telegrams and state whether or not —dated the 15th and 17th of January, signed Casey, Engineers, in one case, and Casey, Engr., in another, and state whether or not your company received those?

(Counsel hands witness telegrams referred to and witness examines same.)

A. Yes, sir; these telegrams were received by our company?

Q. From Major Casey?

A. From Major Casey.

Q. Please state whether or not the first telegram of those two was in response to any telegram sent by the Stone, Sand and Gravel Company, and if so, what it was. What is that at the top, there?

A. The top is a telegram to Major Casey saying we are in negotiations—

Q. I understand, but is that a copy of telegram sent him?

A. Sent by us, as we were negotiating with Clark and Company of Galveston, who had a dredge of very large capacity, to put it to work, and we got two replies, one on the 15th from Major Casey deferring action and then on the 17th, instead of saying we could go ahead with the work, he told us the contract was annulled.

Offer—Mr. Miller:

I offer in evidence the telegram from the Stone, Sand and Gravel Co. to Major Casey dated January 15th, 1900,
148 marked S-3, which reads as follows:

"Jany. 15, 1900.

Maj. Thos. L. Casey,
Corps Engineers, U. S. A.,
Vicksburg, Miss.

We are in negotiations for the hire of further plant with view of continuation of work under present contract and specifications. Do you intend recommending change of plans or specifications? Please wire answer.

STONE, SAND & GRAVEL CO."

Offer—Mr. Miller:

I offer in evidence telegram marked S-4 reading as follows:

"Vicksburg, Miss., Jan. 15, 1900.

Stone, Sand & Gravel Co.,
203 Cora Bldg.,
New Orleans, La.

Information requested by your telegram, will be furnished in few days.

CASEY,
Engineers."

Offer—Mr. Miller:

I offer in evidence the telegram marked S-5, which reads as follows:

"Vicksburg, Miss., January 17.

Stone, Sand and Gravel Co.,
203 Cora Bldg., N. O., La.

Have recommended that your contract be annulled and work readvertised.

CASEY, Engr."

149 Q. What did you refer to in that telegram to Major Casey? What you say about the Galveston people?

A. Yes, sir. Clark and Company's large dredges that we had virtually closed an agreement to put to work as quick as we could get them in Lake Centennial.

Q. What equipment did you have when you started in with that work, your company, I mean?

A. We had three dredges, some small mud scows, towboats, barges, and we had the largest towboat and barge fleet

on the Mississippi River between our combined companies, we owned over 80 pieces. And we had been doing a great deal of dredging on the river before.

Q. Were you engaged in the stone and gravel business at Prophet's Island?

A. Yes, sir.

Q. Supplying the needs of this city?

A. Yes, sir.

Q. Was the John Gaston one of those dredges?

A. It was.

Q. Then you got another boat, that was that?

A. We had the John Gaston, we had the Buster doing dredging at Prophet's Island, excavating, then we had the Vance which did dredging for us at different places.

Q. I see that the chief of engineers, John Wilson, in this communication to the Secretary of War, states that the Stone, Sand and Gravel Company was out of its class in making that bid and undertaking that work when they could not accomplish it. Is that a fact? Could you or not have accomplished the work?

A. I am very confident we could have accomplished the work.

Q. Did you make any other efforts to get an extension of this time to begin work and to do the work, outside of your applications to the engineers?

A. We did.

Q. Did you have any communication with the Secretary of War in regard to it?

A. I don't precisely remember if our communications with the Secretary of War were before or after the annulment.

Q. Read this letter and state whether or not that
150 is a copy of a letter written by your company or by its representative in reference to that work?

(Counsel hands witness letter referred to.)

A. This letter of February 3rd was written after the return of several of our people who had gone to Washington and had a private interview with the War Department and Engineer Department so as to get an extension of the time and was written and dictated according to some suggestions they got up at Washington.

Q. Did you write that letter?

A. I wrote the letter from notes that had been given me.

Q. What was the object of that letter?

A. To get an extension of time so as to complete that contract.

Offer—Mr. Miller.

I offer this letter in evidence to be marked S-6, and which reads as follows:

"Stone, Sand & Gravel Co.
New Orleans, La., February 3, 1900.

Hon. Elihu Root,
Secretary of War,
Washington, D. C.

Sir:

Your petitioners respectfully beg to represent, in the matter of their request for an extension of time on their contract for excavation for diverting mouth of Yazoo River, Mississippi that they feel very well satisfied that, said extension being granted, they can resume operations with their plant, which would give them close on to the amount required by contract, the description of plant being as follows:

1. Dredge John Gaston.

This is a clam shell dredge, with four yard buckets, already employed on the work. From long use, its hull and parts of its machinery are in bad order, but in this condition
151 it has excavated three thousand cubic yards in twenty-four hours.

Its "frictions," the most important part of its hoisting machinery, are new, and its main engine has ample power and is in good working order. We have a suitable new hull almost completed for it, and the worn parts of its machinery can be replaced or repaired. With the machinery put in order and tansferred to the new hull, this will be a good strong dredge, capable of excavating four thousand yards in twenty-four hours. The overhauling and transfer of this machinery can be done in three months.

Dredge St. John.

This is a hydraulic dredge, having two independent 15-inch centrifugal pumps with different points of application. It has a very powerful Deane plunger pump, with 8-inch discharge, and is made to develop a water pressure of 300 pounds to the square inch, producing a cutting and agitating effect, unusual in this class of dredges.

The pumps are geared to be run at the high rate of 300 revolutions per minute. Each pump is run by a powerful double engine.

All this machinery with the necessary pipes, fittings and connections, is set up ready for operation. Unfortunately a very defective hull was bought for this dredge after an inspection of it and favorable report made by an experienced steamboat captain.

Extensive repairs have been made, and trusses to sustain and distribute the weight of the machinery have been built under the main deck. With this reinforcement (which can be added to if necessary) the hull is deemed strong enough to carry the machinery and resist the comparatively slight strains developed by the machinery of a hydraulic dredge while working.

There are castings in one of the centrifugal pumps, which on trial proved defective. These are to be replaced by the maker, and as soon as this is done, the dredge can be put to work and the hull and machinery tested.

The machinery is built after approved patterns and
152 is good and amply strong.

Should the hull prove insufficient a good boat can be bought and the machinery can be transferred to it.

The average daily output of this dredge in material suitable for hydaulic dredging will be at least 6000 cubic yards. Calculated by the result obtained by the tests of capacity made on the government hydraulic dredges, used on the Mississippi River, the output of the St. John will be over ten thousand cubic yards in twenty-four hours in clean running sand.

The towboat is old and insufficient in power, as stated, but a suitable towboat will be promptly provided.

The scows in use are in an advanced state of decay, but they can be so repaired as to make them serviceable for a time.

One of the two 500 yard dump scows we have been build-

ing is finished ready to be launched, and the other can be completed within three weeks.

3. New Dipper Dredge.

On the last day of October, 1899, our company contracted with John Featherstone's Sons Company of Chicago for the machinery of a first class, up-to-date dipper dredge with a seven-yard bucket.

This large and powerful dredge is of the scoop type, which is best adapted to the excavation of materials varying in character, as those do which we have to excavate, and it is the only dredge that will excavate economically all the kinds of material that actually occur in large quantity in our work. It is to be a duplicate of a dredge widely known as Lydon & Drew's No. 2, which has been doing great work at Chicago.

And, if, after consideration, the department decides not to grant the extension asked for, then we would request that the government release us from our bond and reimburse us the actual cost of removing 76,000 cubic yards excavated to date, which amounts to $20,996.41, and of course exceeds the contract price, due to the fact that the first part of the
153 work was more or less of an experimental character, the benefit of which will now be derived by the government or by future contractors. We think this request fair and just, inasmuch as we have put into the plant at Vicksburg, Mississippi, the sum of $94,416.50, the greatest part of which will be lost to us, should this contract be cancelled; and further, it was only after Major Willard had assured us that he would advise the extension of our contract that we stopped work and suspended our organized force, thus putting us at the absolute disadvantage of being unable to get the force ready again and organized, in order to attain anything like the daily amount of excavation required when he notified us that he had decided to report adversely, and that our contract should be cancelled. We would further state that after Major Willard had assured us that he would so advise on our second request for extension, that the company decided to put up $100,000 more to increase its plant, and that as a matter of fact this amount was subscribed and that twenty-five per cent was paid in when Major Willard's adverse report was received necessitating the holding up of all work on the plant in

progress. Therefore, we would respectfully request that if the extension asked for be not granted, that we be reimbursed the amount before mentioned.

Relative to the financial ability of our company to carry on the contract, we only think it necessary to repeat the assurances previously given, the extension being granted us, there will be no difficulty in getting the money necessary to carry on the work.

Hoping that this will receive your favorable consideration, we remain, sir,

Your obedient servants,
STONE, SAND AND GRAVEL COMPANY,
President and Receiver, Secretary and Co-Receiver."

Witness:

May I state that our first request for an extension of time was asked for six months, but Major Willard said that being he was going out of office he could not recommend that, but would give us 45 days, and when the new engineer in
154 charge came in we could take the further extension up with him.

Q. That 45 days ran you to January 24th?

A. Yes, sir.

By a Juror.

Q. Did you receive any reply to that letter, from the Secretary of War?

A. I don't remember of any reply from him. All we got was the notice from the War Department.

By Mr. Miller.

Q. The next thing you hear the annulment of the contract on March 7th?

A. Yes, sir.

Q. Do you know whether any Congressman from this city got any letter from him?

A. I don't remember whether he did or not.

Q. Did you make any estimate of the profit in that work at 8.49 cents per cubic yard?

A. We figured that we would make 3 cents a cubic yard profit minimum, and Major Willard showed us figures he had

made that the work should be done for 5 1/2 cents per cubic yard actual cost.

By Mr. (Bullitt) Spencer.

Q. Do you know the handwriting of Mr. Fornaris?

A. Very well.

Q. I show you a letter purporting to be signed by Mr. Fornaris as president of the Stone, Sand & Gravel Company, addressed to Major Willard, and I will ask if that letter is in his handwriting and whether that letter was sent?

(Counsel hands witness letter referred to.)

A. That letter is typewritten and it is signed in his own hand. I remember bringing him that letter myself and he signed it in my presence.

Q. That letter was delivered to Major Willard?

A. That letter was mailed to him.

155 Offer—Mr. (Bullitt) Spencer.

I offer in evidence letter marked A-1.

Mr. Miller.

The Stone, Sand and Gravel Company joins in the offer.

Q. Do you remember receiving a reply from Major Willard to that letter of yours bearing date December 8th, and if so, state where the original is and if you know whether that is a true copy of the letter if you are unable to produce the original?

(Counsel hands witness document referred to.)

A. I remember receiving this reply, but I do not [know] where the original is.

Q. That is a copy?

A. That is a copy; yes, sir.

Mr. (Bullitt) Spencer.

I will read this letter to the jury.

"United States Engineer's Office,

Vicksburg, Miss., December 8, 1899.

Mr. S. V. Fornaris,
Prest. Stone, Sand & Gravel Co.,
Rooms 203 and 205 Cora Building,
New Orleans, La.

Sir:

Your letter of November 25, 1899, applying for extension of time until January 24th, 1900, for commencing work with full output, under contract of June 14th, 1899, for excavation for diverting mouth of Yazoo River, was received and forwarded to the chief of engineers, U. S. Army, November 27, with recommendation that the desired extension of fifty days be granted.

My recommendation was approved by the chief of
156 engineers December 2, 1899.

Very respectfully,
J. H. WILLARD,
Major, Corps of Engineers."

Mo. Yazoo 169
A true copy:

WM. W. CASEY,
Major, Corps of Engineers."

Offer—Mr. (Bullitt) Spencer:
I offer that letter in evidence marked A-2.

Mr. Miller.
I join in the offer.

Q. Now, I show you a letter purporting to be sent to Major Willard also bearing date Dec. 8th, and I will ask you if that is a copy of a letter which was sent by you to Major Willard and whether the letter was signed by you. I call your attention to the fact that the signature is left blank there.

(Counsel hands witness letter referred to.)

A. That is a carbon copy of a letter I sent to Major Willard and which I signed.

Offer—Mr. (Bullitt) Spencer.

I offer this letter in evidence marked A-3, which offer is joined in by Mr. Miller.

The letter reads as follows:

"Stone, Sand & Gravel Co.

New Orleans, La., Dec. 8, 1899.

Major J. V. Willard,
Vicksburg, Miss.

Dear Sir:

We have your valued favor of December 8th and have duly noted contents.

From same we find that we have to make up a
157 deficiency of 150,108 cubic yards before we shall be entitled to any payment.

What construction will you put on the quantity of excavations up to January 25th? How much shall we have to attain by that date in order to secure payment?

We are determined to leave no stone unturned to attain the necessary quantity.

Your obedient servant,

SEC."

Q. Now, I show you a letter purporting to come from Major Willard, addressed to you, of December 13th, 1899, and ask you if you received that letter from Major Willard?

(Witness is handed letter referred to.)

A. Yes, sir.

Offer—Mr. (Bullitt) Spencer.

I offer letter in evidence marked A-4.

Mr. Miller.

I join in this offer.

Offer—Mr. Bullitt.

We offer in evidence the decision of the Assistant Comptroller Mitchell of the Treasury Department, June 30th, 1898, as taken from the 4th volume of the decisions of the Comp-

troller of the Treasury, and as shown on pages 675 to 681, the heading of that article being revocation of the annulment of a contract.

Mr. Miller.
I join in that offer.

Mr. (Foster) Waguespack.
I object to it.

158 The Court.
Objection sustained and bill reserved.

Cross-Examination.

By Mr. (Foster) Waguespack.

Q. When did the Stone, Sand & Gravel Company go into the hands of receivers?

A. I think it was the latter part of January or the first of February, if I am not mistaken.

Q. Of what year?

A. 1900.

Q. That was before you had done any work on this contract for the government?

A. No, sir; we had done a lot of work before that.

Q. You went into the hands of a receiver?

A. Yes, sir.

Q. So when you were asking for these further extensions and had arranged for this further capital, etc., the concern was really in the hands of receivers?

A. No, sir. We asked for extension before that time. When the extension was denied, all the expenses we had gone finding that our contract was to be annulled or had been annulled, we passed into the hands of a receiver and our valuable plant was sacrificed, the property that we had at Vicksburg was sold for little or nothing and all our property we had here was sold for nothing at all and we lost some $300,000 to make this little amount of money the government never paid, $6,000.

Q. You got nothing back for it?

A. No, sir.

Q. What work had the Stone, Sand and Gravel Company done before entering into this contract with the government?

A. Done for other parties, you mean?

Q. Yes?

A. We had, for instance, under the government we had dredged out Bayou Teche for them, we had done some work for Hunter, Payne & Company over there at Mobile.

159 Q. What was the result of your Hunter, Payne work?

A. The result was not very flattering from the fact that the estimates were wrong, and the machinery did not work right on that work. Still we did not lose any money on it. We came out all right.

Q. Was that contract taken away from you?

A. No, sir.

Mr. Spencer.

I do not see how that can have any bearing on this case.

A. We completed the contract.

Q. That was the only work you had done of this kind?

A. We were doing dredging in the harbor here and at different places all the time, previous to that.

Q. There is no question at all about the fact that you had not assembled a sufficient plant?

A. There is no question about that and we had not had the time to do it.

Q. And that you did not start work within the extension time granted you?

A. We did not.

By Mr. Miller.

Q. Did your company engage any engineer of note or national reputation?

A. We engaged Gen. Wm. S. Smith, who was supposed to be the finest engineer in the U. S.

Q. And he had charge of this undertaking?

A. Yes, sir.

Q. As consulting engineer?

A. Yes, sir. He was a graduate of West Point and he had done a great deal of work at Chicago on the canals there and all kinds of public works throughout the Union.

Q. He was down here during the war?

A. Yes, sir.

160 By Mr. (Foster) Waguespack.

Q. How old was he?

A. He must have been about 64, something like that, 60 or 64.

Q. He was a general in the army in the war of '60 and '65. Is that the same person?

A. That is about his age, that was nine years ago.

By Mr. Spencer.

Q. I want to get this cleared up. I understand that your company did not go into the hands of a receiver until after Major Casey notified you by that telegram of January 17th that he would not grant any further extension—

A. It was after that time.

Q. And had annulled your contract?

A. Yes, sir.

By Mr. (Foster) Waguespack.

Q. You were in the hands of a receiver on February 3rd, 1900?

A. That was after January 17th.

By a Juror.

Q. The contract was annulled on the 7th of March. Well, there was a formal order to the effect that the annulment was going to be recommended on—

A. On January 17 we had notice it was going to be done and we were discouraged in every respect, they did not want us to do the work, and it was confirmed on those dates.

Q. And you went into the hands of a receiver about the end of January?

A. About the end of January or 1st of February.

Q. You took it that this recommendation of the engineer to annul the contract was going to be approved?

A. We felt it was absolutely positive, we couldn't get around it although we did all we could.

Q. And your creditors you say took the same view of it?

A. Yes, sir.

161 By Mr. Spencer.

Q. In other words when you found out your con-

tract was to be annulled you saw no hope, financially, for the company?

A. That is a fact. It just left us with this extraordinary expense on hand, all this stuff to be paid for, no work to do, nothing coming in from it.

By a Juror.

Q. When was that company organized?

A. It had been organized many years before.

Q. Many years before you got this contract?

A. Yes, sir; possibly ten years before.

Mr. Miller.

The defendant, the Stone, Sand and Gravel Company rest their case.

By Mr. Spencer.

We now offer the deposition of HENRY C. WILLCOX, who being sworn as a witness on behalf of the defendant, American Surety Company of New York, deposed as follows:

Direct Examination.

By Mr. Mason.

Q. What is your full name?

A. Henry C. Willcox.

Q. What is your present business?

A. I am at present one of the vice presidents and the general solicitor of the American Surety Company of New York.

Q. What office did you hold in that company between November, 1899, and March, 1900?

A. I was general solicitor of the American Surety Company.

Q. Will you tell me what was the practice of that company, where, after the issuance of a bond or an obligation, some change therein or in the contract secured thereby was to be made, and the American Security Company's consent was desired thereto?

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A. It was the invariable rule to refer the papers connected with the obligation to me as general solicitor, having charge of the legal department of the company, or in

my absence, to refer them to my assistant, Mr. Jarvis W. Mason. On consideration of the questions presented, if it was by me concluded that the company's assent to the change should be given, I made a memorandum of the facts recommending that the company assent to the change, and that with the written assent was then presented to the president or the vice president for signature.

Q. The petition in this case avers that the United States, at the request of the Stone, Sand & Gravel Company, extended the time for commencement of the work contracted for from December 5th, 1899, to January 24th, 1900. Was any request for the assent of the American Surety Company of New York thereto referred to you?

A. There was not.

Q. Did you ever advise the assent by said company to any such extension?

A. I did not.

Q. Did the plaintiff, the United States, cause to be delivered to, or served upon the American Surety Company, any notice respecting the annulment of the contract between the United States and the Stone, Sand & Gravel Company? If so, please state the facts, and file with said deposition the notice and any paper or papers accompanying the same.

A. Such a notice of annulment was received by me through the mail, the original of which I have here and now produce, together with the envelope in which it was by me received. Accompanying such notice of annulment was a copy of a letter referred to in such notice of annulment, which copy I also have here and now produce.

The first paper is marked "Exhibit 1, January 18th, 1908."

163 By Mr. Spencer.

Which we now offer in evidence, and mark "Exhibit A-5."

"Exhibit A-5."

"United States Engineer Office.

Vicksburg, Mississippi, March 7, 1900.

American Surety Company,
100 Broadway,
New York, N. Y.

Gentlemen:

I inclose for your information copy of a notice of annulment of contract of June 14, 1899, between Major J. H. Willard, Corps of Engineers, U. S. Army, and the Stone, Sand & Gravel Company of New Orleans, La., for excavation for diverting mouth of Yazoo River, near Vicksburg, Miss., a bond for fulfillment of which was executed by you June 15, 1899.

Very respectfully,

(Signed) THOS. L. CASEY,
Major, Corps of Engineers.

(1 inclosure.)
Mo. Yazoo 206."

The second paper is marked "Exhibit 2, January 18th, 1908."

By Mr. Spencer.

Which we now offer in evidence and mark "Exhibit A-6," and which reads as follows:

"United States Engineer Office.

Vicksburg, Mississippi, March 7, 1900.

Stone, Sand & Gravel Company,
203-205 Cora Building,
New Orleans, La.

Gentlemen:

As you have failed to prosecute the work of excavation for diverting mouth of Yazoo River, near Vicksburg, Miss., in accordance with the specifications and requirements
164 of the contract entered into by you June 14, 1899, the said contract hereby is annulled; this action hav-

ing received the sanction and approval of the secretary of war and of the chief of engineers, U. S. Army.

Very respectfully,

THOS. L. CASEY,
Major, Corps of Engineers.

Mo. Yazoo 205.

A true copy:
(Signed)

THOS. L. CASEY,
Major, Corps of Engineers.

The envelope is marked "Exhibit 3, January 18th, 1908."

By Mr. Spencer.

Which we now offer in evidence and mark "Exhibit A-7."

Q. Was any other or further notice of demand delivered or served upon the American Surety Company, respecting the annulment of the said contract?

A. There was not.

Q. Was any notice given at the time or at any other time in connection with the said notice of annulment that the Surety Company was expected or would be permitted on behalf of its principal to perform or complete the contract of the Stone, Sand & Gravel Company, or to respond in damages for the failure of said Stone, Sand & Gravel Company to perform or complete said contact?

A. There was not.

Q. Will you tell anything further you may know in relation to this matter or any notice served in connection therewith?

A. I might perhaps say that the practice of the company concerning the passing upon requests for the extension of time to commence performance of contracts, or extensions of time for the performance of contracts themselves of which I have testified, was an invariable rule. No officer of the company had any authority to execute any such consent, without its having been first approved by me, or in my absence,
165 by my assistant, except that the president had such authority. He has never been known to exercise it, and I think I may add here that the American Surety Company did not consent to any extension of the time for the com-

mencement of the work under the contract or for the performance of the contract.

Cross-Examination.

By Mr. Denison, Assistant U. S. Attorney.

Q. In December, 1899, you were not vice president?

A. I was not.

Q. You were then general solicitor?

A. I was.

A. [Q.] At that time was there anybody besides yourself and the president who had authority from your company to give any consent to any extension of any kind in connection with the contract of which your company was the surety?

A. I think not.

Q. Would the then vice president have such authority?

A. Hardly, because of the rule that all such assents must first be passed upon by the legal department.

Q. Who was your assistant at that time?

A. Mr. Jarvis W. Mason.

Q. He had authority in your absence?

A. To approve of the execution of such consents; then they would go from him to me or one of the vice presidents, their action being based on his authority.

Q. How many vice presidents were there at that time?

A. Three, besides so-called resident vice presidents, who were elected to the office of resident vice president merely in order that bonds and undertakings executed at places other than the home office may have the force of valid obligations of the company, and whose authority was conferred by two resolutions, certified copies of which are annexed hereto and marked "Exhibits 4 and 5."

166 By Mr. Spencer.

We now offer in evidence the certified copy of said resolution and now mark it "Exhibit A-8," which reads as follows:

"Extracts from the Record Book of the Executive Committee of the American Surety Company of New York.

"A meeting of the executive committee of the American

Surety Company of New York was held on the 20th day of October, 1897.

* * * * * * * *

"The following resolutions were adopted:

"Whereas, there have been established in various cities throughout the country local boards, presided over by a resident vice president; and,

"Whereas, it is proper and expedient to define the duties and responsibilities of such resident vice presidents and members of local boards; therefore,

"Resolved, that it is fully understood and agreed by the American Surety Company of New York, that no person who consents to serve as a member of a local board assumes or incurs, by such consent or service, any responsibility whatsoever for the proper conduct of the business of the company at that place or elsewhere, by its said administrative or executive officers.

"Resolved, that the members of local boards are understood to be actuated, in accepting such appointment, by motives of friendliness and courtesy towards this company; and all that is expected of them is to allow the company the benefit which it derives from the use of their names as local references, together with the further advantage of securing for its officers the benfit of such information as the members of the local board may be pleased to give, and of such assistance, in maintaining and extending the business of the company, as it may be convenient and agreeable to them to render.

"Resolved, that the office of resident vice president exists merely in order that bonds and undertakings executed at places other than the home office may have
167 the force of valid obligations of the company; and that a resident vice president incurs no responsibility whatsoever in joining in the execution of such obligations as may be issued in accordance with the rules and regulations of the company."

State of New York,
County of New York, ss.

I, F. J. Parry, assistant secretary of the American Surety Company of New York, do hereby certify that I have com-

pared the foregoing extracts and transcripts, from the record book of the executive committee of the American Surety Company of New York, with the original record of said executive committee, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said record book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the minute book of said company, and do certify that the same are correct and true transcripts therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the company, at the City of New York, this 28th day of December, 1907.

(Signed) F. J. PARRY,
[Seal] Assistant Secretary."

By Mr. Spencer.

And we offer certified copy of said resolution, marked "Exhibit 5," and now mark it "Exhibit A-9," which reads as follows:

"Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

"At the quarterly meetings of the board of trustees of the American Surety Company of New York, held on the 18th day of Jany., 1899, and the 17th day of Jany., 1900. * * *

"The following resolution was adopted:

168 "Resolved, that the resident vice presidents be and they hereby are, and each of them is hereby authorized and empowered to execute and deliver and attach the seal of the company to any and all obligations for or on behalf of the company, such obligations, however, to be attested in every instance by the resident assistant secretary.

State of New York,
County of New York, ss.

I, Henry Tofts, assistant secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcript from the record book of the executive committee of the American Surety

Company of New York, with the original record of said executive committee, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said record book; and I further certify that I have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution; and that the said resolution has not been revoked or rescinded.

Given under my hand and the seal of the company, at the City of New York, this 21st day of Jany., 1908.

(Signed) HENRY TOFTS,
[Seal] Assistant Secretary."

Q. Did you have such a resident vice president in New Orleans in 1899 and 1900?

A. Yes.

Q. Did you have a resident manager there at that time?

A. Yes.

Q. How many instances have you known of extensions such as this in the time for beginning the work with certain equipment? I mean how many extensions in contracts of which your company was the surety?

169 A. I do not recall any at this moment.

Q. This was the only one you recall—this present case?

A. My recollection is that we did not know of this extension until long afterwards.

Q. I was asking whether you have, in your experience, up to now, in connection with this company, known of any other instance than this one, in which the extension of the time of the contractor had been granted or to that effect?

A. Undoubtedly there have been instances, but I do not recall any.

Q. Have you any idea how frequent they are?

A. They are infrequent.

Q. Are you sure that there was one?

A. Not being able to recall any, I cannot say. However, I might add that I feel confident that there were such cases.

Q. In any event they have been, if there have been any, very infrequent?

A. Yes.

Q. But the applications for extension of time within which to complete the work have been frequent?

A. Yes.

Q. And your company has exercised the general policy with reference to those applications?

A. Yes.

Q. And that is the invariable rule which you testified to?

A. Yes.

Q. Did you receive the paper marked "Exhibit 1" and attached to this deposition mailed the date which appears on its face?

A. It came through the mail in a regular government envelope and following the regular course of business was brought to me. I then stamped on its face the date of its receipt.

Q. And the date which appears in a stamp on the face of this exhibit is the date of its receipt?

A. Yes.

Q. What was your first knowledge from any source of this extension of the time for beginning the work with the prescribed capacity?

170 A. My recollection is that it was not until quite a long time afterwards.

Q. Who had charge, on behalf of your company, of its relations with this particular job, after your bond had been executed and delivered?

A. I do not think we had any relations with the job. We put the papers away and paid no further attention to it.

Q. Do you keep in touch with the contractors in those cases at all?

A. No.

Q. Do you ever have any inspector, either with that title or with any other title, whose function it is to keep in touch with the work that is being done in any way?

A. No.

Q. And you did not in this case?

A. No.

Q. Have you any other office, except the office in this city?

A. Yes, we have offices in practically all the large cities.

Q. What was your nearest office to the locus of this work?

A. We had an office at New Orleans—not a general office.

Q. Was any new contract executed in writing, so far as you know, between the government and the contractor in ref-

erence to the work which was the subject of your surety bond?

A. None that I know of, except possibly the government's extension of the time for the commencement of the work might be a new contract.

Q. So far as that, you do not know—whether any new consideration was given to the contractor, or anything like that?

A. I do not.

Q. Your only information was that the government allowed the contractor additional time up to January 24th, 1900, for putting out the work of a plant with a capacity of 260,000 cubic yards per month?

A. That is right.

Re-Direct Examination.

By Mr. Mason.

Q. The practice to which you refer, of refering all changes to the legal department applied to any change in the
171 suretyship, whether extension of time to commence work or extension of time to complete, or change in the work to be done, or any change whatever?

A. Yes.

Re-Cross-Examination.

By Mr. Denison, Assistant U. S. District Attorney.

Q. By whose order?

A. By the president's order—I have a faint recollection it was by order of the executive committee.

Q. But you don't mean to say, Mr. Wilcox, that there was any established custom of referring to the legal department the question of an indulgence of some weeks to a contractor, in respect to his undertaking beginning the work?

A. Yes, I do.

Q. How can you say that, Mr. Wilcox, when you cannot recall a single instance in which that was done?

A. Because I am thoroughly familiar with the order itself, and while I cannot recall any specific instance in which that was done, still, as I have said, I am confident there were such cases.

Q. Was there any order, either verbal or in writing, to that effect?

A. My recollection is that there was a written order circulated generally among the officers of the company and steadily adhered to, because of the necessities of the business.

Q. When was such an order issued?

A. It was in the spring of 1899.

Q. Can you produce a copy of it?

A. Cheerfully, if I can find it.

Q. Will you try to find one and add it to this commission if you can find it?

A. Cheerfully.

Q. Can you say definitely that your recollection of that order is that it specifically referred to such an extension as this, as distinguished from an extension of time to complete the work?

172 A. Yes; it covered both and many other questions. It covered generally anything that changed conditions from those which existed at the time our bond was issued, for instance—

Q. Do you mean that this order specifically recited this particular kind of an action or do you mean that it used general language which you construed to cover this case?

A. I mean to say that it used general language which I construed to cover all changes.

Q. But there was no specific order in respect to this specific kind of an action?

A. Only except so far as the general order covered the specific case.

Q. This kind of an action has occurred, if at all, very infrequently, and you recall no instance of it?

A. That is right, sir. I have searched for a copy of the written order referred to on the preceding page, but such an order has not been found.

HENRY D. LYMAN, being called and sworn as a witness on behalf of the defendant, American Surety Company of New York, deposes and says, as follows:

Direct Examination.

By Mr. Mason.

Q. What is your full name?

A. Henry D. Lyman.

Q. What is your business?

A. President of the American Surety Company of New York.

Q. How long have you been president?

A. Since April 12th, 1899.

Q. Did you in the spring of 1899 issue a general order that all applications to the Surety Company to consent to any alterations in a suretyship obligation or any instrument referred to therein should be first referred to the legal department, if requiring execution by the company?

A. Yes, I think it was in April of that year.

Q. Who at that time was the head of the legal
173 department?

A. Mr. Henry C. Wilcox, general solicitor, and Mr. Jarvis W. Mason, assistant general solicitor.

Q. The petition in this case avers that the United States, at the request of the Stone, Sand & Gravel Company, extended the time for commencement of the work contracted for from December 5th, 1899, to January 24th, 1900. Did you ever sign such an extension or authorize it?

A. No, not to my recollection.

Q. Did you ever sign or authorize such an extension without reference thereof to the legal department?

A. No.

Q. Have you ever received any further or other notice or demand in relation to the bond and contract referred to in the complaint, other than the Plaintiff's Exhibit 1 of this date?

A. No.

Q. In particular, was any notice given at the time of or in connection with such notice of annulment or at any time thereafter, that the Surety Company was expected to perform or complete the contract of the Stone, Sand & Gravel Company or to respond in damages for the failure of said Stone, Sand

& Gravel Company to perform or complete said contract until the service of process in this action?

A. No.

Cross-Examination.

By Mr. Denison, Assistant U. S. Attorney.

Q. I understand that when orders such as that to which you have testified are issued in the home office, they are generally issued in a typewritten form and distributed in that form to the officers, who stamp them with their receipt and return them to your office?

A. If the form originated with the general solicitor, it would be drawn in the form you describe, and then stamped and returned to him.

Q. Would that be the case with such an order as this to which you refer?

A. Yes.

174 Q. Would there be a copy of the form of that order, as prescribed by yourself in your own office?

A. No.

JARVIS W. MASON, being called and sworn as a witness on behalf of the defendant, American Surety Company of New York, deposes and says as follows:

Direct Examination.

By Mr. Willcox.

Q. What is your full name?

A. Jarvis W. Mason.

Q. What is your business?

A. Assistant general solicitor of the American Surety Company of New York. I have been that since a date earlier than January 1st, 1899.

Q. What was the practice in the office of the American Surety Company of New York in reference to applications to that company to assent to changes in suretyship obligations or in contracts or documents referred to therein?

A. By direction of the president issued shortly after the election of Mr. Lyman to the presidency and in April or May,

1899, all such applications were referred to the legal department, of which Mr. Henry C. Wilcox, general solicitor, was the head. In his absence they were referred to me. If approved by either of us, they were executed by the president or a vice president. If not approved, they were not executed, unless the president so directed.

Q. The petition in this case avers that the United States, at the request of the Stone, Sand & Gravel Company, extended the time for commencing work contracted for from December 5, 1899, to January 24th, 1900. Did you ever approve of an application to the American Surety Company to assent thereto?

A. I did not.

Q. Do you know of any such application having been approved by the American Surety Company of New York?

A. I do not.

Q. Did the plaintiff, the United States, cause to be delivered to or served upon the American Surety Company any notice respecting an annulment of the contract between the United States and the Stone, Sand & Gravel Company other than Exhibit 1 of this date?

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A. It did not, so far as I know, and I have examined the files for the purpose of seeing if there is any on file.

Q. Was any notice at any time given in connection with the bond or contract referred to in the complaint herein that the Surety Company was expected or would be permitted on behalf of its principal to perform or complete the contract of the Stone, Sand & Gravel Company or to respond in damages for the failure of the Stone, Sand & Gravel Company to perform or complete said contract, prior to the demands immediately preliminary to the commencement of this action?

A. No such notice was received.

Cross-Examination.

By Mr. Denison, Assistant U. S. Attorney.

Q. What was the first you knew about this job after the execution of the bond by your company?

A. I do not think I heard of it until the receipt of the notice dated March 7th, 1900.

Q. Do you know whether any representative of your company had any prior knowledge of this job in any way subsequent to the execution of the bond?

A. Our files do not reveal that any one had any knowledge of it other than that incidental to the execution of the bond.

Q. Was the notice of March, 1900, the first thing that you knew of in any way in connection with this job?

A. That is my best recollection.

Q. Have you searched the files?

A. I have.

Q. How are the files in your office arranged? Would all letters and data of every kind affecting this contract be filed in one bundle?

A. They would be filed in one bond wrapper.

Q. What papers are there in that?

A. There are the papers incidental to the execution of the bond, and there is the notice of March 7th, 1900, and there is a more or less extensive correspondence thereafter
176 relating generally to some bills which were presented to Congress to relieve the contractor and to request that we join therein. Something of that sort utterly immaterial to this.

Objection—Mr. Spencer.

I object to the words "and there is a more or less extensive correspondence thereafter relating generally to some bills which were presented to Congress to relieve the contractor and to request that we join therein," as irrelevant and incompetent.

By the Court.

The objection is sustained and a bill reserved.

Q. What did you do in respect to that request?

A. I do not think we did anything. I would not be familiar with legislative matters, even if there was anything done.

Q. Was there no correspondence whatever prior to March, 1900, after the correspondence in relation to mere execution of the bond?

A. There was none.

Mr. WILLCOX recalled.

By Mr. Denison, Assistant U. S. Attorney.

Q. Do you know what attitude your company took in reference to the application by the contractor for legislation?

Objection—Mr. Spencer.

I object to the question as irrelevant.

By the Court.

The objection is sustained and a bill reserved.

A. My recollection is that the attitude of the company was favorable, hoping that they would get it.

Q. Did your company in any way join in the application?

Objection—Mr. Spencer.

I object to the question as irrelevant.

177 By the Court.

The objection is sustained and a bill reserved.

A. I think not.

Q. Did anybody appear under retainer from your company in respect to that application?

Objection—Mr. Spencer.

I object to the question as irrelevant.

By the Court.

The objection is sustained and a bill reserved.

A. No, except that there was somebody connected with the Stone, Sand & Gravel Company that wanted us to let them have an advance of a few hundred dollars which we did for traveling expenses.

Mr. MASON recalled for further cross-examination.

By Mr. Denison, Assistant U. S. Attorney.

Q. Was there a resident assistant secretary at your New Orleans office at the time of the execution of the bond in the suit?

A. There were probably several.

Q. Was there a general manager there at that time?

A. There was a manager.

Q. A resident manager?

A. He was simply called manager.

Q. Who was that manager at that time?

A. Peter F. Pescud.

Q. Was he also a resident vice president at that time?

A. He is now and I think he was then.

Q. The practice was this, was it not: The manager at a local office would consider applications for bonds, having ascertained first that they were not in the class as to which it was necessary for him to have special authority from the home office. He presented them to the resident vice president for execution, or if they required previous approval from the home office, he obtained that and presented that to the resident vice president, who thereupon executed the bond?

A. Yes.

178 PETER F. PESCUD, witness sworn and examined on behalf of the American Surety Co., testified as follows:

Direct Examination.

By Mr. Spencer.

Q. What is your connection with the American Surety Co. of New York?

A. I am the resident assistant secretary.

Q. How long have you been connected with the American Surety Co. of New York.

A. About 10 or 12 years; I don't remember the exact date.

Q. What was your position with the American Surety Co. during the years 1899 and 1900?

A. I was in that capacity, resident assistant secretary.

Q. Were you in charge of their business in New Orleans?

A. Yes, sir.

Q. I want to ask you to state whether or not, at any time, during the year 1899 or 1900 you received any notice from the United States Government—or had any knowledge of any extension granted to the Stone, Sand & Gravel Company by the United States Government of the time of the commencement of the work under their contract which they had with the government?

A. No, sir.

Q. If any such notice had been received by you, to whom would it have been referred?

A. To the counsel of the company.

Q. Who were the counsel?

A. Your firm.

Q. Any particular member of that firm?

A. You would have attended to it.

Q. I want to ask you to state whether or not, representing the American Surety Co., you ever received any notice of the annulment of this contract?

A. No, sir.

Q. Do I understand you to say that you had no notice whatever at any time of any extension granted by the government to the Stone, Sand & Gravel Co. for the com-

179 mencement of this work?

A. Yes, sir.

Cross-Examination.

By Mr. Foster.

Q. You are well acquainted with Mr. Fornaris, are you not?

A. Yes, sir.

Q. You knew he was the president of the Stone, Sand & Gravel Co.?

A. Yes, sir.

Q. I presume that fact had something to do with your executing so large a bond for the company, his connection with it?

A. Yes, sir.

Q. Now, did Mr. Fornaris ever say anything to you about

the difficulties this company was having in completing their work, or in starting it rather?

A. No, sir.

Q. Did you see him frequently?

A. No, I did not see him frequently. My office is not far away.

Q. His office was diagonally across Carondelet Street at that time?

A. Yes, sir.

Q. And he never had occasion to talk to you about the work this company was going to do?

A. No, sir.

Q. He never said they were arranging an extension or anything of that sort?

A. I can recall nothing of the kind.

Q. Now, suppose an extension had been asked, would your company have agreed to it?

180 Mr. Spencer.

I object to that as utterly incompetent and irrelevant. It is purely hypothetical.

The Court.

I think the objection is good.

DEFENDANT'S EVIDENCE.

Letter of Major Casey, Dated March Seventh, 1900, to Stone, Sand and Gravel Company, Marked "S-1."

Offered by Defendant and Filed January 24, 1908.

United States Engineer Office.

Vicksburg, Mississippi.

Letter of Mch. 7, 1900, to Stone, Sand & Gravel Co., from Thos. L. Casey, Maj., &c., heretofore printed at page 163.

* * * * * * * *

Copy of Answer to Foregoing Letter Marked "S-2."

Offered by Defendant and Filed January 24, 1908.

March 8, 1900.

Maj. Thos. L. Casey,
Corps Engineers, U. S. A.,
Vicksburg, Miss.

Sir:

We are in receipt of your favor of the 7th inst. informing us that you have annulled contract "for excavation for diverting mouth of Yazoo River, Mississippi."

181 We trust that in accordance with our last interview with you that you have at the same time recommended our being paid for work already done, and that our bond be cancelled, as far as the U. S. Government is concerned.

With expressions of highest regards, we are,

Very respectfully,

.....

Receiver.

Telegram from Casey, engineer, to Stone, Sand and Gravel Company, Dated January 15, 1900, Marked "S-4."

Offered by Defendant and Filed (on first trial) January 24, 1908.

Telegram.

Na., Y. Fg.
10-Vx. Ks. Fg. 13-Collect 1-EX.

Vicksburg, Miss., Jan. 15th, 1900.

Stone, Sand & Gravel Co.,
203 Cora Bldg.,
New Orleans, La.

Information requested by your telegram will be furnished in few days.

CASEY,
Engineers.

5.23-P.

Telegram from Casey, Engineer, to Stone, Sand and Gravel Company, Dated January 17, 1900, Marked "S-5."

Offered by Defendant and Filed January 24, 1908.

Dated Vicksburg, Miss.

To Stone, Sand & Gravel Co.,
203 Cora Bldg., N. O., La.

Have recommended that your contract be annulled and work readvertised.

CASEY, Engr.

182 Telegram [from] Stone, Sand and Gravel Company to Major Casey, Dated January 15, 1900, Marked "S-3."

Offered by Defendant and Filed January 24, 1908.

Jany. 15, 1900. 12 M.

Maj. Thos. L. Casey,
Corps Engineers, U. S. A.,
Vicksburg, Miss.

We are in negotiations for the hire of further plant with

view of continuation of work under present contract and specifications. Do you intend recommending change of plans or specifications? Please wire answer.

STONE, SAND & GRAVEL CO.

Letter of Stone, Sand & Gravel Company to Major Willard, Marked "A-1." Offered by Both Defendants and Refered to in Bill of Exceptions.

Stone, Sand and Gravel Company,
Rooms 203-205 Cora Building, New Orleans.

New Orleans, La., November 25, 1899.

Major J. H. Willard,
Corps of Engineers,

Vicksburg, Miss.

Sir:

At the time the contract was awarded to the Stone, Sand and Gravel Company "for excavating 7,500,000 cubic yards of earth, more or less, along route for diverting Yazoo River, near Vicksburg, Mississippi," no complete set of borings had been made, nor had any other means been employed to obtain such knowledge of the materials to be excavated as would indicate the kind of plant required to do work most expeditiously and economically and although the specifications required that the bidders for the work should acquaint themselves with the character of the work and the conditions under which
183 it was to be executed, no detailed and accurate information could be obtained that would clearly indicate the methods and kinds of machinery to be employed short of the actual excavations of portions of the various kinds of materials that occur.

The specifications state that "The results of the borings indicate that there are no masses of logs or rocks underlying the land between Old River and Lake Centennial, and that the material generally is without cohesion and of a character easily removed by hydraulic dredging."

With this impression our company entered into negotiations and was upon the point of purchasing a Bowers dredge at a

cost of $60,000, and to pay royalty for the privilege of using the Bowers patents.

As results prove, this would have been a very unsuitable machine for our purposes.

Fortunately we were strongly advised by our consulting engineer to put the dredge "Gaston" at work with her clam shell dipper and centrifugal pump and so make actual test of the material.

This dredge, two dump scows and one steamboat were sent to the work from New Orleans, July 11, 1899, and located in Lake Centennial at the point indicated for the commencement of the work.

Tests were made at various points, both with the dipper and the centrifugal pump on board the "Gaston," and the desired knowledge obtained by actual trial which it was evident that part of the work could best be done with hydraulic dredge and the remainder with scoop dredges.

Inquiries were at once sent out to many of the dredge building companies throughout the United States to learn the very shortest time in which each one of them agree to complete and deliver such plant.

Effort was also made to find dredges already built that could be bought or chartered for the work.

184 Our company already had a 12" centrifugal pump and engine fully equipped and ready for work on its dredge, the Gaston. A duplicate of this all complete and two 15" centrifugals with engines, suction and discharge pipes were purchased on August 8th and 15th, respectively, for early delivery.

The Gaston was put to work, and its hull and that of the Steamer St. John remodeled and strengthened to fit them for service as hydraulic dredges. The pumps and engines have been put in place on them as fast as they have arrived.

Both pumps on the Gaston are at work and those on the St. John are in place and will be ready for use in a few days.

The pumping that has been thus far done has been mostly in tough clay, in which great efficiency has been expected or realized, but a channel has been cut within two or three hundred feet of a large deposit of sand which is thought to extend several thousand feet up the cut to the point at which the borings made by the government begin. These borings show

that throughout the remaining part of the work sand is the predominating material.

In sand, the combined capacity of the four centrifugal pumps should be seven or eight thousand cubic yards for each 24 hours by conservative estimates.

The company has contracted with John Featherstone's Sons of Chicago, Ill., one of the very best dredge building companies in the United States, for the machinery of a first-class seven-yard scoop dredge for delivery within the next 6 to 8 weeks. This was the only party that could be found which would agree to deliver such machinery inside of three months, and but one other company (The Osgood Dredge Company) within that time. All dredge building shops in the United States, these two excepted, were crowded full of work with orders taxing them to their full capacity for months to come.

Fortunately the Featherstones were building a machinery precisely such as we want for another party, whose consent they obtained to turn it over to us. They assure us that they have a large part of the machinery nearly ready for shipment, so that they can begin delivering it within a very short time.

We are building a very strong hull and have it
185 nearly ready to receive the machinery and put it in place as fast as it arrives so that by the time the first of it is received we can have the dredge about ready to be put to work. The capacity of this dredge is guaranteed to be six thousand cubic yards in 16 hours, or 7,500 yards in 20 hours.

The aggregate capacity of the four centrifugal pumps and the new dredge in rapid course of construction by these estimates would be (7000 yards plus 7500 yards) 14,500 cubic yards. Supposing that they could all be run simultaneously and continuously, which, of course, cannot be expected.

There is a four-yard clam-shell dredge on the Gaston which is now being put in first-class order and condition with the new friction gear complete with which we have excavated 2000 yards in 10 hours (before the renovations were made). This will give us an additional capacity of 4000 yards in 20 hours, increasing the above estimate to 18,500 yards in 20 hours, which is nearly double the capacity required by the contract on the 5th of December next. If we deduct one-third for time lost there will still remain 12,333 yards capacity for each 20 hours.

There are many dredges both of the hydraulic and dipper

types, which are run continuously throughout the entire 24 hours of each day, and as our plant will be so operated one-fifth of the output in 20 hours will be added.

Certainly no further assurance can reasonably be required that the capacity of the plant will be up to and well beyond the requirements of the contract when the plant now provided and the new dredge completed and all at work.

Meanwhile we are sending to the work a new clam shell dredge which we have just completed with capacity of 2500 yards in 24 hours, which, with the dump scows required would be there within ten days from this time.

And with these and the Gaston and St. John, which should be in successful operation within the same time, we hope to have the capacity of 10,000 yards required by the 5th of December.

186 Owing first to the unavoidable loss of time spent in getting the knowledge of the materials to be excavated and necessary to determine the kind of plant best adopted to the work; secondly to the fact that the dredge building shops of the country were crowded with work beyond all precedent, and to such a degree that none of them would contract and deliver the plant required within the contract time; thirdly, that the mills could not furnish the scows within the required time; and, fourthly, that owing to the prevalence of yellow fever and establishment of quarantine during six weeks, obstructed our work and negotiations for our machinery, it has been and may be impossible for us, in spite of the most energetic efforts which we have made and which is evidenced by the correspondence herewith submitted, to complete the plant necessary to excavate 10,000 yards per day by the 5th of December next.

In our efforts to do so we have expended and are under contract to pay $119,000 for one complete plant, that when completed will be in the basin where it will be required and which is inaccessible to other plant during the low stages of the river. This plant will be finished and in operation on or before the 24th day of January next.

We have strenuously, actively and in good faith endeavored to comply with our agreement, as set forth in the contract, and but for the exceptional and remarkable obstacles that have presented themselves, which no human foresight could have discovered or provided against, the required plant would have

been obtained and in operation before the expiration of the time specified, viz: December 5th, 1899.

We therefore respectfully request an extension of that time to the 24th day of January, 1900.

We would add that, as an inducement to the greatest possible expedition, this company voluntarily offered and agreed to pay a bonus to the Chicago concern contracting to supply the new dredge machinery, and they promised that with good luck they will deliver it in two weeks less than the contract time.

187 And furthermore we propose to make other additions to our plant as the work proceeds, with the intention and expectation of doing the work far more rapidly than has been anticipated or required.

Upon considering the foregoing statements I trust you may find it consistent with your sense of right and duty to grant the extension asked for.

Very respectfully,

Your obedient servant,

L. V. FORNARIS,

President Stone, Sand and Gravel Company.

EXTRACTS FROM CORRESPONDENCE BETWEEN STONE, SAND AND GRAVEL COMPANY AND DIFFERENT DREDGE AND MACHINERY BUILDERS, SHOWING CAUSES OF DELAY AND DIFFICULTY IN OBTAINING DIFFERENT ITEMS OF PLANT AND MACHINERY.

A. B. Bowers, Patentee.

Our letter April 27, 1899, says:

"Now, we are desirous of knowing what would be the cost "of a plant that would handle 700 cubic yards per hour."

"Also what would be your charge for the royalty on the "machines to perform the Vicksburg contract."

Their reply of May 3, 1899:

"Cost of a plant that would handle 700 cubic yards per "hour, elevating the material forty feet and discharging it "1700 feet from the dredge * * * a dredge of four hundred "horse power, and think the estimate of $60,000 is a liberal "one." * * * "I could very likely have the Bucyrus Company "build the machine * * * therefore I reduced the amount of the "royalty one and a half cents the cubic yard."

188 Their attorney's letter, New York, June 12, 1899.

Their telegram, dated New York, June 13:
Consent to royalty of 3/4 cents.

Our reply June 17, 1899, states:

"Without looking further into the matter we repeated the "offer made you before of one-half cent royalty per cubic yard * * * and that your telegram answering this insists upon 3/4 "cents royalty. We would want it understood that what we "would pay you on this work at Vicksburg would be full and "complete satisfaction for you for all work to be done."

Their telegram June 13, 1899, recommends Alexander Watt of San Francisco, superintendent, to put up dredge.

At this junction, General Smith advised not closing with Bowers.

Bucyrus Company.

Their letter April 19, 1899, in reply to ours April 15, which says:

"Requirements of the contract will necessitate increasing "the plant which we have by some 6000 to 7000 minimum ca- "pacity daily."

Says:

"We are of the opinion that the most feasible and satisfac- "tory plant to do the work would consist of two separate ma- "chines, first, a 20-inch hydraulic dredge of high power, capa- "ble of working up to a capacity of 500 cubic yards per hour,

"under favorable conditions, and, secondly, a dipper dredge of "about 300 cubic yards hourly capacity."

"We are at present very crowded with work, but are likely "to be more so in the near future. There are a large number "of contracts before us which will be closed within the next "thirty to sixty days and which will occupy us for the next six "months running night and day."

189 Our letter June 14:

"We have been awarded the government contract * * * "We would like to have you quote us prices on a combination "dredge with a six-yard clam-shell and four-yard dipper * * * "You understand that we have only six months to install a "plant for the fulfillment of our contract, and we are desirous "of starting the erection of same at once, so please state at "what date you would commence work on this plant and how "long it would take to complete the same."

Their reply June 14, 1899:

"We can build you a first-class dipper dredge of any size "you desire. * * * In the present state of the iron and steel "market we could not make a definite contract with you as to "time of delivery, but we think we could furnish the machin-"ery in about six months."

Our reply June 16:

"Under the contract which we have we must begin opera-"tions on or before December 5th, 1899. If you would not "be able to furnish machinery inside of six months, it would "be useless for us to go and see you."

Their reply June 22:

"Will say that it will be entirely out of the question for us "to furnish you any kind of a dredge inside of six months. "We are so crowded with work at present that we cannot un-"dertake an important contract like this where the time is so "limited. We understand the importance of your getting to "work on time, and for that reason we are decided that it is

"much better for you to know right from the start that we "could not possibly get it out inside of six months and it might "run over that."

"You are of course aware that it is almost impossible to get "material now for delivery under four months. We have "many orders out for our regular work such as steam shovels "which have been in the hands of the mills for four months "and the demand still keeps up. There is no prospect
190 "that orders will be filled any more promptly than "at present for the next six or eight months. All the "mills are crowded, even the furnaces which make pig iron are "always behind. * * * With the amount of work which we "have on hand we regret to say that we do not care to under-"take the work."

Their letter September 19:

"Regarding delivery of machinery of this kind would say "that it would be absolutely impossible to deliver any kind of "dredging machinery under six months time."

Our letter September 22:

"What is the cost of the machinery for an eight-yard dip-"per and how soon could you deliver it? You state it would "be six months before you could take any contract. Of course "this would make business between us impossible. * * * We "are under contract to excavate a certain number of yards per "day. Therefore we would have to have the machinery we "wanted in sixty days, or as soon after that as you possibly can. "How much premium would you require to give us such ma-"chinery inside of sixty days."

Their reply September 25:

"We will say, however, that it will be absolutely impossible "to get out a dredge of this kind even in six months. * * * "We would not think of undertaking to do it in any less time."

Their letter to General Smith, confirming telephone conversation, September 28:

"As we wrote your people on the 26th inst., we are not in a position to promise delivery of machinery of this size and "class short of six months."

Our letter October 4, 1899:

"Owing to the fact that neither you nor any of the other "dredge builders can furnish us the machinery necessary on "time for our contract we are trying to locate either 191 "a dredge ready for operation or second-hand ma- "chinery for same. Hence the letters which have "found their way back to you. * * * Now, please state if you "can build a seven-yard dipper bucket or a clam-shell. * * * "If you can build these state how soon you can deliver them "and your lowest price."

Their reply October 9, incloses copy of their letter September 26 to General Smith, stating:

"That answers your question."

Breymann Bros., Toledo, O.; Eastern Dredging Co., Boston; Bay State Dredging Co., Boston; New England Dredging Co., Boston, were wired to on September 22, in substance, viz:

"Are your eight-yard Bucyrus dredges employed at present? "If not would you charter or sell. Write particulars. Wire "reply."

Replies came dredges all busy and not for sale or charter.

On September 15 advertisements were sent to the leading newspapers in the country as "New York Herald," "New York World," "Boston Herald," "Engineering News," "Government Advertiser," "Chicago Tribune," etc.

No satisfactory replies were received to such advertisements.

C. S. Burt & Co., Ltd.

Purchased from them July 19 one engine 16x22 for delivery August 10. Engine was only shipped August 26, and somehow

only was delivered us September 29 with defective fly wheel, which they have not replaced yet.

Also July 19, ordered one double heavy duty engine 18x26. Understood delivery to be about September 1. Shipped September 14 from Covington, Ky., and received at Vicksburg September 29, without fly wheel. Fly wheel was over four weeks getting to Vicksburg after that time.

192 August 15, 1899:

Ordered one 15" Van Wie sand pump, to be delivered in four weeks.

August 15, 1899:

Also ordered a second 18x26 double engine to be delivered in three weeks. Offered them bonus of $25 per day every day delivered inside of that time. The pump was shipped September 2d.

On September 25th wrote them pump had not reached Vicksburg yet.

On October 2 wrote them and asked them to start a tracer after the pump, which was delivered during the month of October.

Second heavy engine ordered for shipment three weeks after August 15th. Not delivered at Vicksburg and ready to be set up for work till November 18. Meanwhile the most voluminous correspondence was exchanged with the Burt Co. and the greatest number of telegrams with Houston, Stanwood & Gamble Co. of Cincinnati, builder of the engines.

J. B. Craven, Civil Engineer.

Went to New York twice in the middle of August and the latter part of September, and endeavored to locate machinery for dredges, for quick delivery, but without success. He also visited other places. On his second trip he succeeded in interesting Osgood Dredge Co., and prevailed upon them to offer delivery of machinery for shipment in ninety days. Also interested Ligerwood Manufacturing Co. to do the same for a small sized dredge. He consulted very large number of dredge people.

Big Muddy Coal and Iron Company, St. Louis.

We have purchased from them quantity of coal.
On October 30, they state:

"Owing to increased wages of the men, we cannot take on
"additional business at the same price. * * * Owing to short
"supply of cars, I do not know when we could ship
193 "even at the advanced figure for our coal."

Cramps Ship Yard Co.

Letter June 26:

"Reply your favor 20th. * * * We beg to say that all our
"ship building slips are engaged for some time to come and
"we will therefore be unable to make prices on hulls."

Elizabeth Marine Ways, Elizabeth, Pa.

Letter September 29, answering our telegram:

"It would be impossible for us to deliver the mud scows by
"the date you mention. The large amount of work we have on
"hand not allow us to do so."

Howard's Shipyard, Jeffersonville, Ind.

Declined order to build mud scows as they could not possibly deliver on time.

Houston, Stanwood & Gamble Co., Cincinnati.

Their letter November 13, 1899:

"It is needless to say that we wished several times within
"the last few weeks we did not have your order for several en-
"gines. Our foundry has been so far behind in its work and
"it has been so difficult to get competent moulders, that we
"have been delayed shipping the larger pieces."

This result of many running telegrams and letters.

Hardie-Tynes Foundry and Machine Co., Birmingham.

September 28 placed with them order for frictions for John Gaston to be delivered within three weeks. Frictions were delivered Vicksburg, November 16th.

Their letter October 16th:

"We just wired you will ship in two weeks. The forge peo-
"ple have delayed us in getting out the large shafts as promptly
"as promised, and again we have had two bad accidents in
"the foundry. All of which has delayed us beyond
194 "expectation."

This, their letter October 2:

"Referring to part of machinery for 7-yard dredge; as for
"time of delivery * * * we are going day and night * * *
"We are safe in saying, if you will place this order with us
"promptly for this machinery. * * * We would like at least
"sixty days on this outfit, but if it is absolutely necessary, we
"would get it out a little earlier, that is if the order reaches
"us before we get in too many other heavy jobs."

Their letter October 9, replying ours October 4:

"We are figuring almost daily heavy work of different
"characters. * * * We are getting lots of work. * * * We
"might get so completely filled up with orders that we can-
"not take another heavy contract for anything like reasonable
"delivery."

Hartman Lumber Co., Brookhaven, Miss.

Out of over sixty letters sent out with bill of lumber for mud scows, only four or five could quote for immediate delivery. On October 9 placed order with this company.

Their letter October 9:

"We will be able to get this out for you in ample time, five
"or six weeks, but we accept the bill with this understanding.

"that unavoidable accidents or casualties by fire or strike or "matters and things beyond our control, be accepted in the "filling of this bill."

We have had several letters from them asking us to prevail on railroad to give them cars.

Iowa Iron Works, Ltd.

Letter June 26:

"We beg to acknowledge receipt of your letter of the 16th "of June, but regret that we cannot furnish the dredges you "require by December the 5th, it being impossible
195 "to get the material in time."

Johnson Bros. Co., Chicago.

"We can furnish boilers for new dredge to be shipped in "60 days."

November 3, 1899.

McIlvain & Spiegel B. & T. Co.

Their wire November 3:

"No boilers of required capacity on hand. So crowded with "orders could not make or deliver in less than five months."

Many other boilermakers communicated with for boilers for new dredge, in order to get improved style of boilers. We have two boilers on hand already at Vicksburg. Therefore this dredge would not be delayed on account of these.

The Brownell Company, Dayton, O.

Accepted order delivered in Vicksburg in sixty days from November 4.

Mackey Lumber Co.

Placed order with them for mud scow lumber for one mud

scow October 9. Deliverable in three to four weeks. Their letter October 10:

"Your telegram notifying us that had accepted our bid for "lumber F. O. B. Vicksburg. * * * Our Mr. Mackey will be "on the road in a day or two hurrying shipments, producing "cars, etc." * * *

Their letter October 13:

"Our main trouble to contend with is bad weather and bad "railroad service. * * * Our Mr. Mackey had to come home, "thinking perhaps (as the yellow fever was at Jackson) he "would be quarantined out of Vicksburg. It is necessary, be-
"yond one's comprehension that wants to move large
196 "lots of lumber these times. * * * Our Mr. Mackey
"spent six weeks on the road daily to push up ship-"ments and hurry up car service."

Osgood Dredge Company.

Their letter May 1:

"You say you want a clam-shell or dipper or combination "dredge. * * * We can build a dredge to dig 700 yards per "hour, clam-shell or dipper. * * * We are very busy like "all manufacturers. * * * We could probably furnish it in "about four months from receipt of order. * * * On this "basis you would require two dipper dredges, each with an "eight-yard dipper, which would have a capacity of four hun-"dred yards per hour."

Our letter June 11:

"Kindly state with your quotation at what date work on this "machinery would be commenced and what length of time it "would take you to complete the same. As you understand the "time is drawing near when this work ought to be commenced "and we have no time to lose on the installation of our plant."

Their reply June 20:

"We have all the patterns of this machinery and could com-

"mence work at once, but owing to delays in getting plates, "steel castings, etc., we cannot guarantee any fixed time for "delivery."

Our letter June 23:

"There are two points we wish to make. * * * Second, the "extreme time of four months would cut so terribly into the "six months which are allowed to us, we fear that in case "everything would not work absolutely right we would be be- "hind hand—a condition which we do not want to prevail."

197 Their letter June 26:

"As to time everybody is full of work, and four months is "a short time for this large machinery in ordinary times, but "we happen to be well fixed for handling large work just at "present, and can do it if we have the order."

Their letter September 19:

"Owing to the present difficulty of getting all kinds of steel "and iron we could not undertake to deliver the machinery "under four months from receipt of order, which would allow "you ample time to build a hull and then add a month for in- "stalling machinery in hull. This is the best anybody can do "in these times and you cannot get a machine built anywhere "any quicker. * * * We know of no second-hand machines."

Our letter November 22:

"Now, could we make an arrangement with you by which "to pay you a premium and you to agree to deliver us the "machinery in less time than this? Say, for instance, in sixty "days. Would a premium of $50 a day for every day gained."

Their reply September 26:

"In the present condition of the iron and steel mills and "foundries it is impossible to guarantee deliveries in any fixed "time. * * * Men are scarce and independent, and we can- "not get them to work overtime, nor can we get together a

"night force. * * * We can't get a steel casting in less than "two months and it takes more time than that to get angles "and plates. We are taking no orders, except subject to de-"lay."

Their letter October 1:

"After interview with Mr. Craven, relative machinery for "six or eight-yard dredge. * * * We could furnish machinery "in four months. Machinery for eight-yard dredge in five "months."

198 On October 25th we wired them to have their representative at New Orleans on Monday, October 30, our Mr. Craven having obtained from an agreement that they would arrange for delivery in 90 days, this being the only company outside of Featherstone that would make such an agreement. Their Mr. John K Howe came to New Orleans, but we contracted with Featherstone, who could give us so much quicker delivery.

Marion Steam Shovel Company, Marion, O.

Their letter April 20:

"If you should decide on using anything as small as a three "and a half yard dredge, we shall be pleased to give you any "further information desired regarding same. It would take "from six to nine months to get a machine of this kind as we "are completely covered up with orders and our shops are run-"ning night and day to their fullest capacity. But should you "decide on anything as small as the above we will figure it "down as close as possible and see just what can be done in "the way of shipment."

Their letter September 18:

Indicates that they cannot handle the work.

Their letter September 26:

"We shall be glad to do the very best we can do, but we "could not figure on a large dredge such as you describe for

"delivering before some time next spring, as we are away be-
"hind orders at the present time." Would you kindly advise
"us what the latest delivery is that would answer your pur-
"pose."

Morris Machine Works, Baldwinsville, N. Y.

Correspondence opened with them in April, and their letter May 1 states:

"We could furnish you the 20" double suction dredging
"pump complete on frame to be driven by a 500 horsepower
"engine by means of belt. * * * We could ship this pump
"in five weeks from receipt of order. We have pat-
199 "ents for 500 horsepower triple expansion engines,
"but as you are evidently in a hurry for your ma-
"chinery, and we are at present so crowded with work that
"we are running night and day, we can see no possible chance
"of completing the 500 horsepower engine in less than three
"or four months, which time we suppose would be out of the
"question for you. * * * We beg to say that we are not at
"present in a position to furnish cutter heads."

Our letter June 11:

"We would like to know just exactly how soon and how
"long it would take you to start work and complete the pumps
"and engines required for our work which we propose to use
"at Vicksburg, Miss."

Their reply June 15:

"After giving the subject of engines required due consid-
"eration we have decided that we are not in a position to fur-
"nish them as in our present condition we would require too
"long a time in which to build them. * * * We can furnish
"you one pump complete in ten weeks, or two pumps com-
plete in twelve weeks. We would like very much to promise
"more prompt shipment but we cannot conscientiously do so."

Their letter June 27:

"We certainly wish we were in a position to figure on the "engines and boilers, but we are compelled to admit that we "are not."

Their letter July 7:

"We certainly regret that we are not in a position to make "a price upon the engines, but it would be simply impossible "for us to build them at present."

Their letter August 4:

"We beg to acknowledge receipt of your order for one 12" "sand pump with steel lines. * * * It will be an impossibility "for us to ship this pump under three weeks. We 200 "should like very much to give you more prompt "service, but owing to the very great rush of work, "it is simply impossible for us to do so. * * * As for 15 and "20-inch pumps, we cannot furnish them promptly."

The pump was shipped on time, but was delayed an exceedingly long time on the way; did not reach Vicksburg until a very long time after it was shipped.

Petersburg Iron Works Co.

Our letter to them June 16th:

"Suppose we place an order with you for machinery for a "couple of dredges, could you furnish the same in short or- "der?"

Their reply, June 22:

"As to delivery, we are prepared to execute orders as "promptly as any other concern in our line of business."

They gave us no encouragement as to delivery.

Vulcan Iron Works, Chicago.

Their letter, June 29, replying to ours of 20th:

"Price on five or six-yard combination dipper dredge capable "of handling seven or eight-yard clam-shell bucket, we advise "that we do not have plans on hand for this size machine and "are not in shape to get them ready in short time. If you do "not hear from us within a week or so, please consider that we "are out of the race."

We heard nothing further from them.

Puget Sound Dredging Co., New York.

Gave us no satisfaction about hydraulic dredges.

Suction Hose.

We have found difficulty with the different rubber companies in getting suction hose delivered to us. They have sold us for time delivery, but have never kept their agree-
201 ments. Such firms as Revere Rubber Co., Manhattan Rubber Co. and other large concerns.

Lumber.

We can produce fifty to sixty letters of the leading mills in the different Southern States, stating that their mills are full and refusing to sell us lumber for delivery in short order, of the sizes and qualities required for our dredges and mud scows.

Bolts, Spikes, Etc.

A quantity of bolts ordered from the well-known firm of Stauffer, Eshelman & Co., as far back as July, sold for immediate delivery, were delivered us in September, about the 29th.

John Featherstone's Sons.

We started correspondence with this firm in April, and had come to no conclusion when perchance General Smith found that they were building a dredge of large capacity for another company, which company would not require delivery until

the month of March next. He therefore prevailed on them for a bonus to agree to sell us all machinery necessary except the boilers, which they could not furnish inside of sixty days from October 31, which time they afterwards changed to November 3. They however agreed for a large bonus to try and make delivery two weeks earlier.

Sub-Leasing.

We have tried the best we pos ibly could to charter or purchase a plant from the foremost dredge companies in the South, as well as in the West, without avail. All the owners of this kind of property replied that they had all the work that they could possibly do with their own plants, and would be busy for quite a long while.

We have made the above selection from the correspondence, the volume of which would take at least a full month
202 to collate and present in anything like an adequate manner.

Respectfully submitted.
STONE, SAND & GRAVEL COMPANY,
By J. EDW. CRUSEL,
Secy.

N. O., Nov. 26, 1899.

Letter of Stone, Sand & Gravel Company to Major Willard, Dated December 8, 1899, Marked A-3.

Offered by Defendants and Filed (on first trial) January 24, 1908.

Stone, Sand & Gravel Company,
Rooms 203-205 Cora Building, New Orleans.

Letter of Dec. 8, 1899, to Maj. J. H. Willard, from .....
See, heretofore printed at page 156.

* * * * * * * *

Letter of Major Willard, Dated December 13, 1899, to Stone, Sand & Gravel Company, Marked "A-4."

Offered by Defendants and Filed (on first trial) January 24, 1908.

United States Engineer Office,

Vicksburg, Mississippi, December 13th, 1899.

Mr. J. Edw. Crusel,
Secy. Stone, Sand & Gravel Co.,
Rooms 203-205 Cora Building,
New Orleans, La.

Sir:

Your letter dated December 8, 1899 (sic), asking what construction will be put on the quantity of excavation up to January 25, and how much your company will be
293 required to attain by that date to secure payment has been received.

The terms of the contract of June 14, 1899, do not seem to allow any doubt about this matter, being as follows:

"The said Stone, Sand and Gravel Company shall commence active operations under this contract on or before the fifth day of December, eighteen hundred and ninety-nine (1899), with sufficient force and plant for an output each calendar month of not less than two hundred and sixty thousand (260,000) cubic yards per month, which shall be increased on or before the fifth day of June, nineteen hundred (1900) with sufficient force and plant for an output each calendar month of not less than three hundred and thirty thousand (330,000) cubic yards per month. Provided, however, that if work shall commence before the date first above written in this paragraph, the plant first put in operation shall have an assured capacity of not less than sixty-five thousand (65,000) cubic yards each calendar month until December 5, 1899, and work shall not begin with less output."

The approval by the chief of engineers of the application of your company for extension of time, beginning operations with full output of not less than 260,000 cubic yards, modifies the foregoing paragraph by changing the words "on or before

the fifth day of December, 1829," to "on or before the twenty-fourth day of January, 1900."

The provisions of the contract respecting payment is as follows:

"Payments will be made in accordance with paragraph 37 of the specifications attached to and forming a part of this contract, but, unless the work is stopped or impeded by floods, storms, epidemics, or other causes, beyond control, as may be decided by the engineer officer in charge, and approved by the chief of engineers, U. S. A., it is agreed that if the total amount excavated up to the end of any calendar month should be found to be less than the total required up to that date by the above stated monthly rates of progress, no payment for work done during that month shall be due, nor shall
204 any future payment become due under this contract until by increased rate of excavation it shall appear at the close of some subsequent month that the total excavated up to that time is equal to the total excavation required by the terms of this contract."

Operations having commenced September 1, 1899, the minimum output required to authorize payments is at the following rate of progress, viz:

September 1, 1899, to January 23, 1900, at the rate of 65,000 cubic yards per month.

January 24 to June 4, 1900, at the rate of 260,000 cubic yards per month.

June 5, 1900, et seq., at rate of 330,000 cubic yards per month.

Very respectfully,

J. H. WILLARD,
Major, Corps of Engineers.

Mo. Yazoo, 171.

Testimony of Peter F. Pescud, Offered by the American Surety Company of New York, One of the Defendants, and Made Part of Bill of Exceptions.

Note: Missing from the Record.

Depositions of H. C. Wilcox, Henry D. Lyman and Jarvis W. Mason.

Offered by Defendants and Filed (on first trial) January 24, 1908.

* * * * * * * *

205 Circuit Court of the United States, Fifth Circuit, Eastern District of Louisiana, New Orleans Division.

United States of America, Plaintiff,
vs. No. 13,261.
Stone, Sand & Gravel Company
and
American Surety Company of New York, Defendants.

Depositions of witnesses taken before John A. Shields, clerk of the United States Circuit Court for the Southern District of New York, at his office in the Postoffice Building, in the City of New York, on the 18th day of January, 1908.

Present: For the United States, W. T. Denison, Esq., Assistant U. S. Attorney.
On the part of the defendant, American Surety Company, of New York, Henry C. Willcox, Esq., and Jarvis W. Mason, Esq.

It is hereby consented that the depositions of the witnesses be taken by a stenographer appointed by the clerk of the Court, with the same force and effect as if taken by the clerk in his own handwriting.

It is further agreed that signatures of the witnesses shall be waived, and that all objections shall be reserved until the hearing of the case, excepting objections as to the form of the question or answer, or as to the responsiveness of the answers.

HENRY C. WILLCOX, being called and sworn as a witness on behalf of the defendant, American Surety Company of New York, deposes and says as follows:

Testimony of Henry C. Willcox, heretofore printed at page 161.

* * * * * * * *

206 Testimony of Henry D. Lyman, heretofore printed at page 172.

* * * * * * * *

Testimony of Jarvis W. Mason, heretofore printed at page 174.

* * * * * * * *

Mr. WILLCOX, recalled by Mr. Denison.

Q. Do you know what attitude your company took in reference to the application by the contractor for legislation?

A. My recollection is that the attitude of the company was favorable, hoping that they would get it.

Q. Did your company in any way join in the application?

A. I think not.

Q. Did anybody appear under retainer from your company in respect to that application?

A. No, except that there was somebody connected with the Stone, Sand & Gravel Company that wanted us to let them have an advance of a few hundred dollars, which we did, for traveling expenses.

Letter Marked A-5.

Recd. Mar. 12, 1900. H. C. W.

United States Engineer Office.

Vicksburg, Mississippi.

.....March 7, 1900.

Received at office of President, Mar. 12, 1900.
Ansd.....

Letter of Mch. 7, 1900, to Amer. Surety Co., from Thos. L. Casey, Maj., &c., heretofore printed at page 163.

* * * * * * * *

This was all the testimony adduced on both sides.

Thereupon, the plaintiff's counsel requested the Court to direct a verdict in favor of the plaintiff, and the Court did so accordingly, to which action of the Court, the defendants, then and there, excepted, and by leave of the Court, their bill of exceptions was reserved, all before the jury retired, and defendants requested the Court to charge the jury peremptorily to find a verdict for the defendants, which request was by the Court refused, and thereupon, defendants' counsel,
207 before the jury had retired, instantly excepted, and, by leave of the Court, their bill of exceptions was reserved, and, thereafter, counsl for defendants filed a motion for a new trial which was on the 3rd day of February, 1911, by the Court overruled, and time was granted defendants for the presentation, settlement and signing of bills of exception herein, and now, to the end that the foregoing testimony and rulings of the Court may be made part of the record herein, the said defendants present this, their bill of exceptions herein, to his Honor, the presiding Judge, and pray that the same may be allowed and signed and so made part of the record and the

same being agreed to and as correct by counsel on both sides, it is, accordingly, done, this the 5th day of March, A. D. 1911.

(Signed) W. I. GRUBB, Judge.

O. K.

(Signed) W. J. WAGUESPACK,
Ass't U. S. Attorney.

PETITION FOR WRIT OF ERROR.

Filed July 21, 1911.

In the Circuit Court of the United States for the Eastern District of Louisiana.

The United States, Plaintiff,
vs. No. 13,261.
The Stone, Sand & Gravel Company, and The American Surety Company, Defendants.

To the Honorable the Judges of said Court:

The petition of the Stone, Sand & Gravel Company and the American Surety Company, defendants in the above mentioned and entitled cause, with respect shows that they are
208 aggrieved by the judgment therein rendered, in favor of the plaintiff, on the 2nd day of February, 1911, and signed on the 2nd day of February, 1911, and desire to obtain a writ of error to said judgment, without supersedeas, returnable to the United States Circuit Court of Appeals, for the 5th Circuit.

Wherefore, they pray that your Honors will grant a writ of error to said judgment, for the reasons specified in the assignment of errors filed herewith, returnable to the United States Circuit Court of Appeals for this the 5th Circuit, and that a transcript of the record, proceedings and papers upon which said judgment was rendered, duly authenticated, be sent to said Circuit Court of Appeals.

(Signed) THE STONE, SAND & GRAVEL COMPANY.
By T. M. & J. D. MILLER, Its Attorneys.
(Signed) THE AMERICAN SURETY COMPANY.
By DENEGRE & BLAIR, Its Attorneys.
Dated July 10th, 1911.

ORDER GRANTING WRIT OF ERROR.

Filed July 21, 1911.

In the Circuit Court of the United States for the Eastern District of Louisiana.

No. ——

The United States, Plaintiff,
and
The American Surety Company, Defendants.

Considering the petition of said defendants, this day presented, it is ordered that the writ of error to the judgment rendered against them in said cause be and the same
209 is hereby granted and allowed, as prayed for, upon said defendants furnishing bond with surety, in the penalty of one thousand dollars, conditioned for the payment of all costs that have accrued or may accrue in said cause in said Circuit Court of Appeals.

Ordered, this the 14th day of July, A. D. 1911.

(Signed) DAVID D. SHELBY,
Circuit Judge, Fifth Circuit.

ASSIGNMENT OF ERRORS.

Filed July 21st, 1911.

In the Circuit Court of the United States, Fifth Circuit, Eastern District of Louisiana.

The United States
vs. No. ——
The Stone, Sand & Gravel Company
and
The American Surety Company.

The said defendants having prayed for a writ of error to the final judgment of this Court to the United States Circuit Court

of Appeals, do assign errors as follows in the record and proceedings therein:

First. That the Court erred in charging the jury peremptorily to find a verdict against the defendants upon the evidence.

Second. That the Court erred in refusing defendant's request to charge the jury upon the evidence to find a verdict for the defendants.

Third. That the Court erred in rendering a judgment for the plaintiff and against the defendants.

210 Wherefore, defendants pray that the judgment of the said Circuit Court be reviewed and reversed.

(Signed) T. M. & J. D. MILLER,
Attorneys for Defendant, The Stone, Sand & Gravel Co.
DENEGRE & BLAIR,
Attorneys for the American Surety Co.

BOND FOR WRIT OF ERROR.

Filed July 21, 1911.

United States Circuit Court, Eastern District of Louisiana.

The United States
vs. No. 13,261.
Stone, Sand & Gravel Co., et al.

Know all men by these presents, that we, The Stone, Sand & Gravel Company and the American Surety Company, as principal, and the Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto the United States, in the penal sum of one thousand dollars ($1,000), for the payment of which, well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents, signed with our names and sealed with our seals, this the 21st day of July, A. D. 1911.

The condition of the above obligation is such that, whereas, the above bound principal obligors have prayed for and obtained a writ of error to a certain judgment rendered against them, on the 2nd day of February, 1911, and signed on the 2nd day of February, 1911, by the Circuit Court of the United States, for the Eastern District of Louisiana, in a certain suit therein depending in which the United States was plaintiff, and the Stone, Sand & Gravel Company, as principal, and the American Surety Company, as surety, were defendants, which said writ of error, without supersedeas, is returnable
211 to the Circuit Court of Appeals of the United States for the Fifth Circuit, at New Orleans.

Now, therefore, if they, the said principal obligors, shall prosecute the said writ of error with effect and shall well and truly pay and satisfy all the costs accrued in said cause, and all such further costs as shall be awarded and adjudged against them by said Circuit Court of Appeals, then this obligation shall cease and become null and void; else, shall be and remain in full force and virtue in law.

(Signed) STONE, SAND & GRAVEL COMPANY.
PP. T. M. MILLER.
Its Atty. of Record.
AMERICAN SURETY COMPANY OF N. Y.
(Signed) By PETER F. PESCUD,
Manager for Louisiana.
FIDELITY & DEPOSIT CO. OF MD.
(Signed) By P. M. MILNER,
[Seal] Local Director.
Attest:
(Signed) C. E. WARNER.
General Agent.

Bond.
Approved July 21st, 1911.
(Signed) DAVID D. SHELBY, Judge.

212 STIPULATION AS TO TRANSCRIPT.

Filed August 4, 1911.

United States Circuit Court, Fifth Circuit, Eastern District of Louisiana.

United States
vs. No. 13,261.
Stone, Sand & Gravel Company.

Stipulation.

In this cause, it is agreed between T. M. & J. D. Miller, attorneys for the Stone, Sand & Gravel Company, and Denegre & Blair, attorneys for the American Surety Company, and Charlton R. Beattie, U. S. district attorney, as follows:

First. It is agreed that in making up the transcript herein the clerk shall omit the evidence offered on the previous trial herein, and shall in lieu thereof insert the following memorandum:

Memorandum.

This evidence (being that offered on the first trial herein) is omitted, and this memorandum is made, by stipulation of counsel appearing at page 35 of this transcript; the same evidence (except as to the few changes indicated) having been offered at the second trial and appearing at pages 47 to 206 of this transcript.

Second. That the clerk shall preface the bill of exceptions on the second trial, and evidence in connection therewith, to be printed in this transcript, with the following memorandum:

213 Memorandum.

By stipulation of counsel (to be found at page 212 of this transcript) the evidence offered on the first trial was omitted, being identical with the following evidence (including proceedings in relation thereto) except as to changes indicated; the

erasures made as to the second trial being shown as erasures, and the additions being shown in italics.

(Signed) T. M. & J. D. MILLER,
Attorneys for the Stone, Sand & Gravel Co.
(Signed) DENEGRE & BLAIR,
Attorneys for the American Surety Co.
(Signed) CHARLTON R. BEATTIE,
United States District Attorney.

214 That thereafter, the following proceedings were had in the said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz.:

OPINION OF THE COURT.

Filed April 10th, 1912.

United States Circuit Court of Appeals, Fifth Circuit.

Stone, Sand & Gravel Company
and
American Surety Company of New York, Plaintiffs in Error,
vs. No. 2271.
The United States, Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

By the COURT.

The present is the second writ of error in this case. When it was first here the judgment was reversed and the cause remanded with directions to enter judgment in favor of the government. United States vs. Stone, Sand & Gravel
215 Co., 177 Fed. 321. In obedience to the requirements of the mandate, judgment was duly rendered, and the Court is now requested to review its former ruling and to again remand the cause.

"It is," said the Supreme Court in Thompson vs. Maxwell Land Grant Company, 168 U. S. 456, "the settled law of this Court, as of others, that whatever has been decided on one appeal or writ of error canont be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case. Supervisors vs. Kennicott, 94 U. S. 498, and cases cited in the opinion; Clark vs. Keith, 106 U. S. 464; Chaffin vs. Taylor, 116 U. S. 567; Northern Pacific Railroad vs. Ellis, 144 U. S. 458; Great Western Telegraph Company vs. Burnham, 162 U. S. 339, 343."

It is, however, insisted by counsel for the plaintiffs in error

that the ruling on the first writ of error, in construing the contract between the parties, is in direct conflict with United States vs. O'Brien, 220 U. S. 321, recently decided
216 by the Supreme Court. Analysis of the O'Brien case will disclose that it is clearly distinguishable from the case at bar. In that case there was no breach of contract, and it was held, under the facts appearing of record, that the government could not declare a breach so as to hold the contractors liable in damages for failure to perform. The following clause of the syllabus correctly reflects the ruling of the Court:

"Where, except for the prohibition of the United States to allow the contractor to proceed, the work might have been finished within the specified period, the United States cannot claim a breach entitling it to annul the contract and hold the contractor responsible for the difference in cost of completion."

In the present case there was an utter failure on the part of the contractor to perform his contractual obligations, and the government, on that account, was compelled to relet the contract to other parties. Bearing in mind this distinction, we are of the opinion that the ruling, made by this Court upon the first writ of error, is not in conflict with the views expressed by the Supreme Court in the O'Brien
217 case.

The judgment of the trial court should be affirmed, and it is so ordered.

JUDGMENT.

Extract From the Minutes of April 10th, 1912.

The Stone, Sand & Gravel Company, et al.,
vs. No. 2271.
The United States.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed.

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218 PETITION AND ORDER FOR WRIT OF ERROR.

Filed June 14th, 1912.

United States Circuit Court of Appeals, Fifth Circuit.

Stone, Sand & Gravel Company
and
American Surety Company of New York, Plaintiffs in Error.
vs. No. 2271.
United States of America, Defendant in Error.

To the Honorable the Judges of said Court:

The Stone, Sand and Gravel Company and American Surety Company of New York, plaintiffs in error, in said above entitled cause, feeling themselves aggrieved by the judgment and decree entered on the 10th day of April, 1912, come now by T. M. and J. D. Miller, and Denegre and Blair, their attorneys, and petition this Court for an order allowing said plaintiffs in error (defendants in the lower Court) to prosecute a writ of error, without supersedeas, to the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, and
219 also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that citation issue.

And petitioners file and present herewith their assignment of errors against and in respect to said judgment and proceedings in said cause.

(Signed) STONE, SAND AND GRAVEL COMPANY.
By T. M. & J. D. MILLER,
Its Attorneys.
(Signed) AMERICAN SURETY COMPANY OF NEW YORK.
By DENEGRE & BLAIR,
Its Attorneys.

ORDER.

Let a writ of error in the above cause issue as prayed for in the petition upon the petitioners furnishing bond with surety conditioned as the law directs and provides in the sum of one thousand dollars.

(Signed) DON A. PARDEE,
Circuit Judge.

June 11th, 1912.

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220 ASSIGNMENT OF ERRORS.

Filed June 14th, 1912.

In the United States Circuit Court of Appeals, Fifth Circuit.

Stone, Sand & Gravel Company
and
American Surety Company of New York, Plaintiffs in Error.
vs. No. 2271.
United States of America, Defendant in Error.

Stone, Sand and Gravel Company and American Surety Company having prayed for a writ of error to the final judgment of this Court to the Supreme Court of the United States, in connection with their petition for writ of error herein, do assign errors as follows in the record and proceedings therein:

First. The Circuit Court of Appeals erred in holding that the case of United States vs. O'Brien, 220 U. S. 321, was not decisive of this case, and in not reversing the verdict and judgment of the United States Circuit Court for the East-
221 ern District of Louisiana and the previous decision of said Circuit Court of Appeals in this case reported in 177 Federal Reporter, 321.

Second. That the Circuit Court of Appeals on the first writ of error sued out in this case erred in its decision and decree of March 29th, 1910, reported in 177 Federal Reporter, 321, in reversing the judgment of the United States Cicuit Court for

the Eastern District of Louisiana, rendered January 25th, 1908, in favor of the Stone, Sand and Gravel Company and American Surety Company, rejecting the demand of the United States and dismissing its suit.

Third. That the Circuit Court of Appeals erred in assuming that the petition of the United States stated a cause of action against the Stone, Sand and Gravel Company and American Surety Company, and in holding that it did state a cause of action.

Fourth. That the Circuit Court of Appeals erred in holding that the annulment by the United States of its original contract with the Stone, Sand and Gravel Company did not release both the Stone, Sand and Gravel Company and its surety, the American Surety Company, from obliga-
222 tion thereunder.

Fifth. That the Circuit Court of Appeals erred in holding that the extension of time for the beginning of the work from December 5th, 1899, to January 24th, 1900, granted by the United States to the Stone, Sand & Gravel Company, without the consent of its surety, the American Surety Company, was not such an alteration in the terms of the contract that the surety became released from obligation thereunder.

Sixth. That the Circuit Court of Appeals erred in holding that the new contract made by the United States with the Atlantic and Pacific Company did not differ so materially from the contract made with the Stone, Sand and Gravel Company, as not to form a proper measure of damages for the default of the original contractor, the Stone, Sand and Gravel Company, in respect to the performance of its contract, and did not in effect operate as a discharge of the original contract.

Seventh. That the Circuit Court of Appeals erred in not holding that in any event, the consequence of the an-
223 nulment by the United States of the contract with the Stone, Sand and Gravel Company was only a forfeiture of the Gravel Company's right to proceed for the completion of the contract and of all money or reserved per-

centages due to the said Gravel Company by reason of said contract.

(Signed) J. P. BLAIR.
(Signed) GEO. DENEGRE.
(Signed) VICTOR LEVOY.
(Signed) DENEGRE & BLAIR.
Attorneys of American Surety Company of New York.
(Signed) T. M. & J. D. MILLER.
Attorneys for Stone, Sand & Gravel Company.

BOND ON WRIT OF ERROR.

Filed June 14th, 1912.

224 Know all men by these presents, that we, Stone, Sand & Gravel Company and American Surety Company of New York, as principals, and Fidelity & Deposit Company of Maryland, as sureties, are held and firmly bound unto United States of America in the full and just sum of one thousand dollars, to be paid to the said United States of America, certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this —— day of June, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a session of the United States Circuit Court of Appeals for the Fifth Circuit, held in the City of New Orleans, Louisiana, in a suit depending in said Court, between Stone, Sand & Gravel Company and American Surety Company of New York, plaintiffs in error, vs. United States of America, defendant in error, a judgment was rendered against the said Stone, Sand and Gravel Company and American Surety Company of New York, on the 10th day of April, 1912, and the said Stone, Sand and Gravel Company,

225 and American Surety Company of New York, having obtained a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing them to be and ap-

pear before the United States Supreme Court, to be holden at Washington, D. C., within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said Stone, Sand & Gravel Company and American Surety Company of New York shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of:

(Signed) STONE, SAND & GRAVEL COMPANY.

By T. M. and J. D. MILLER,

[Seal] Its Attorneys.

[Seal] (Signed) AMERICAN SURETY COMPANY OF NEW YORK.

By PETER F. PESCUD,

Manager for Louisiana.

226 FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

(Signed) By P. M. MILNER,

Local Director.

Attest:

CHAS. H. BLACK, Gen'l Agt.

Approved by—

(Signed) DON A. PARDEE,

Circuit Judge.

EXCERPTS FROM TRANSCRIPT OF THE RECORD IN RE:

United States Circuit Court of Appeals, Fifth Circuit.

United States of America, Plaintiff in Error,

vs. No. 1893.

The Stone, Sand & Gravel Company, et al., Defendants in Error.

Hearing of case; motion of defendants for peremptory charge; ruling of Court thereon; exception reserved thereto; verdict of jury.

227 EXTRACT FROM THE MINUTES OF THE U. S. CIRCUIT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

November Term, 1907.

New Orleans, Saturday, January 25th, 1908.

Court met pursuant to adjournment.

Present: Hon. Aleck Boarman, District Judge.

The United States
vs. No. 13,261.
Stone, Sand & Gravel Company
and
American Surety Company of New York.

This cause, as continued from yesterday, was this day resumed, and the counsel for the respective parties, as well as the jurors impaneled in the cause, being all present, the trial was proceeded with.

At the conclusion of the hearing of the testimony and evidence, the United States attorney moved the Court to direct a verdict in favor of the United States, and the counsel for the defendants moved the Court to direct a verdict in favor of the defendants.

After hearing the arguments of the counsel, the Court refused the motion of the U. S. attorney to direct a
228 verdict in favor of the plaintiff, and granted the motion of the counsel for defendants to direct a verdict in favor of the defendants; whereupon the United States attorney reserved a bill of exceptions to the ruling of the Court.

Thereupon, after receiving a charge from the Court, and under instructions from the Court, the said jury did then and there, in open court, through their foreman, Andrew Fitzpatrick, render and deliver the following verdict, to-wit:

We, the jury, find a verdict in favor of both defendants.
January 25, 1908.
ANDREW FITZPATRICK, Foreman.

Whereupon, it was ordered that the said verdict be recorded, and it is done accordingly.

RULE FOR NEW TRIAL.

Entered and Filed February 1, 1908.

U. S. Circuit Court, E. D. of Louisiana, New Orleans Division.

229 United States
vs. No. 13,261.
Stone, Sand & Gravel Company
and
American Surety Company.

On motion of Rufus E. Foster, U. S. attorney, and on suggesting to the Court that the verdict herein rendered on January 25th is contrary to the law and the evidence, it is ordered that the Stone, Sand & Gravel Co. and the American Surety Co. do show cause on a day to be fixed why a new trial should not be granted herein.

(Signed) ALECK BOARMAN, Judge.

ORDER REFUSING NEW TRIAL.

Extract From the Minutes.

April Term, 1908.

New Orleans, Monday, June 1st, 1908.

Court met pursuant to adjournment.

Present: Hon. Aleck Boarman, District Judge.

230 The United States
vs. No. 13,261.
The Stone, Sand & Gravel Company, et al.

This cause came on at a former day to be heard upon the motion of the United States for a new trial herein, and was argued by counsel for mover and by counsel for the defendants, and submitted to the Court.

Whereupon, the Court having duly considered the same, it

is now ordered that the said motion be overruled; that a new trial herein be and the same is hereby refused, and that the verdict of the jury remain undisturbed.

PETITION OF UNITED STATES FOR WRIT OF ERROR AND ORDER.

Filed November 20th, 1908.

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

United States
vs. No. 13,261.
231 Stone, Sand & Gravel Company
and
American Surety Company of New York.

Now comes the United States, by Rufus E. Foster, United States attorney, duly authorized and directed to appear in this behalf, and respectfully shows:

That there is error to its prejudice, and the United States is aggrieved by the verdict of the jury herein and the judgment entered thereon on the 25th day of January, A. D. 1908, and signed on the 5th day of June, A. D. 1908, and desires to prosecute a writ of error thereto.

Wherefore, the annexed assignment of errors being considered, the petitioner, the United States, prays that it be allowed a writ of error herein, returnable to the Circuit Court of Appeals for the Fifth Circuit, at New Orleans, within thirty days from this date.

That defendants be cited and notified according to law, and further, that the United States be dispensed from giving bond.

(Signed) RUFUS E. FOSTER,
United States Attorney.

232 ORDER.

Considering the foregoing petition and annexed assignment of errors, it is ordered that the United States be allowed a writ

of error herein, returnable to the Circuit Court of Appeals for the Fifth Circuit, at New Orleans, within thirty days from this date, and that citation issue to defendants according to law.

And it is further ordered that the United States be dispensed from giving bond.

New Orleans, November 20, A. D. 1908.

(Signed) ALECK BOARMAN, Judge.

ASSIGNMENT OF ERRORS.

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

United States
vs. No. 13,261.
Stone, Sand & Gravel Company
and
American Surety Company of New York.

And now comes the United States, plaintiff herein, praying for a writ of error, and assigns the following errors
233 in the proceedings, verdict and judgment herein:

I.

The Court erred in not directing a verdict for plaintiff and against both defendants upon all the evidence and testimony adduced before the jury.

II.

The Court erred in directing a verdict against the plaintiff in favor of defendant, the Stone, Sand & Gravel Company.

III.

The Court erred in directing a verdict against the plaintiff in favor of the American Surety Company of New York.

IV.

The Court erred in overruling plaintiff's motion for a new trial.

V.

The Court erred in rendering judgment against plaintiff in favor of defendant, the Stone, Sand & Gravel Company.

234 VI.

The Court erred in rendering judgment against plaintiff in favor of defendant, the American Surety Company of New York.

For these and other errors apparent on the face of the record, the United States prays that the verdict herein be set aside and judgment reversed. And for such further and general relief as this Honorable Court may be pleased to grant.

(Signed) RUFUS E. FOSTER,
United States Attorney.

That thereafter, the following proceedings were had in the said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz.:

JUDGMENT.

Extract From the Minutes of March 29th, 1910.

United States Circuit Court of Appeals, Fifth Circuit.

The United States
vs. No. 1893.
235 The Stone, Sand & Gravel Company, et al.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause, be, and the same is hereby, reversed, and this cause remanded to said Circuit Court, with directions to have judgment entered for the plaintiff against the Stone, Sand

& Gravel Company, and its receivers as such, and the American Surety Company, in solido, in the sum of seventy-five thousand ($75,000.00) dollars, with legal interest from judicial demand, and against the Stone, Sand & Gravel Company and its receivers as such, in the further sum of one hundred forty-six thousand nine hundred ninety-five and 22/100 ($146,995.22) dollars, with legal interest from judicial demand, being amount due the plaintiff after allowing the Stone, Sand & Gravel Company a credit of six thousand and two hundred six and 69/100 ($6,206.69) dollars for excavation done
236 by it.

ORDER DENYING REHEARING.

Extract From the Minutes of November 14th, 1910.

United States Circuit Court of Appeals for the Fifth Circuit.

The United States
vs. No. 1893.
The Stone, Sand & Gravel Company, et al.

Ordered that the petition for rehearing filed in this cause be, and the same is hereby denied, and that mandate issue in this cause.

STIPULATION AS TO TRANSCRIPT AND PRAECIPE IN CONNECTION THEREWITH.

Filed June 27th, 1912.

United States Circuit Court of Appeals, Fifth Circuit.

The Stone, Sand & Gravel Company
and
237 The American Surety Company of New York
vs. No. 2271.
The United States of America.

Whereas, the defendants, the Stone, Sand & Gravel Com-

pany and the American Surety Company of New York, have sued out writs of error to the Supreme Court of the United States in this case; and whereas, there have been two writs of error prosecuted from the trial Court to the Court of Appeals, in each of which transcripts of the record were printed; and whereas, each of said transcripts of the record printed and filed in the United States Circuit Court of Appeals contained the same documents and proceedings and the same evidence; and whereas, it is desired now, in order to save costs in preparing the transcript for the Supreme Court of the United States, by printing but one copy of each document and but one copy of the evidence, etc., thus avoiding duplication.

238 It is hereby agreed, that, in the preparation and printing of the transcript of the record for the United States Supreme Court, each and every document be printed and each and every entry of the minutes, and all the evidence and other proceedings be printed, but that none of said documents, proceedings or evidence be printed more than once.

(Signed) CHARLTON R. BEATTIE,
U. S. Atty.

(Signed) T. M. & J. D. MILLER,
Attorneys for the Stone, Sand & Gravel Co.

June 27th, 1912.

Hon. Frank H. Mortimer,
Clerk, Court of Appeals,
City.

Dear Sir:

Having regard to the stipulation of counsel this day filed with you, in the case of the Stone, Sand & Gravel Co. and the American Surety Company vs. the United States, No. 2271, in making up the transcript for the Supreme Court, you will please include the entire transcript on the last writ of error, that is to say, in No. 2271, and so much of transcript in No. 1893 as follows:

239 1st. P. 21, motion of the United States and motion of the defendants for peremptory charges, and ruling of the Court thereon, the latter part on page 22.

2nd. Exception reserved.

3d. Verdict of the jury, on page 22.

4th. Rule for new trial and order refusing same, on p. 23 and p. 24.

5th. Petition for writ of error by United States, p. 175.

6th. Asignments of errors, p. 176.

7th. Transcript of proceedings and judgment of Circuit Court of Appeals, on first writ of error, reversing the judgment of the Circuit Court, and order refusing a rehearing.

Kindly state, in the certificate, that the transcript on first writ of error omits testimony, pleadings, and other things which are duplicated in the transcript in No. 2271, and, of course, you will include the minutes of the Court of Appeals in the case from which the writ of error is prose-
240 cuted.

Yours very truly,

(Signed) T. M. MILLER and DENEGRE & BLAIR,
Attorneys for Plaintiff in Error.

CLERK'S CERTIFICATE.

United States Circuit Court of Appeals, Fifth Circuit.

Clerk's Office.

I, Frank H. Mortimer, clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing 219 pages contain a full, true and complete copy of the printed record in a certain cause in the said Court, numbered 2271, wherein The Stone, Sand and Gravel Company, et al., are plaintiffs in error, and the United States of America is defendant in error, upon which said cause was heard and decided in said Court, together with full, true and complete copies of all the pleadings, record entries and proceedings in said cause in said Circuit Court of Appeals, and such excerpts from the printed record in a certain
241 cause in said Court numbered 1893, wherein the United States of America is plaintiff in error, and the Stone, Sand & Gravel Company is defendant in error, and such pleadings, record entries and proceedings in said cause in said Court, as are set forth and specified in the stipulation as to the transcript, and the praecipe in connection therewith, copied in this transcript at page 217, all as full, true and complete as the originals of the same now remain in my office.

In testimony whereof, I hereunto subscribe my name, and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 5th day of July, A. D. 1912.

[Seal] (Signed) FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals
for the Fifth Circuit.

Office Supreme Court U. S.
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APR 14 1914
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 302.

STONE, SAND & GRAVEL CO. AND AMERICAN SURETY CO.,
Plaintiffs in Error,

vs.

UNITED STATES,
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE PLAINTIFFS IN ERROR.

1. **The United States cannot recover the excess cost of completing a dredging contract, but is limited to the forfeiture of the retained pay.**
   U. S. **v.** *O'Brien*, **220 U. S. 321 is controlling.**
2. **The surety is released by an extension of time.**
3. **The excess cost of completion is not a proper measure of damage when the work is completed under different and more expensive conditions.**

WM. MARSHALL BULLITT,
Counsel for Plaintiffs in Error.

HENRY C. WILLCOX,
T. M. MILLER,
Of Counsel.

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

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ARGUMENT.

I. **The contract as construed in *U. S.* v. *O'Brien*, 220 U. S. 321, means as follows, to wit**..... 13–31

Clause A: If the contractor (1) fails to begin work on the day specified or (2) fails (in the judgment of the Government engineer) to prosecute the work faithfully, then the United States may annul the contract, *i. e.*, refuse to perform it further; in which event the United States may keep all money or retained percentages in its hands, but shall have no further damages.

Clause B: On the other hand, if the Contractor fails to complete work by the time agreed on, whether such failure be due to (1) a repudiation or refusal amounting to an anticipatory breach or (2) abandonment after doing some work or (3) mere failure to complete though still working at the expiration

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of the contract period, then in either such event, the United States may recover the excess cost of completing the work.

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III. The American Surety Company was released by reason of the 50 days' extension of time (from December 15th, 1899, to January 24, 1900), which the United States granted to the Contractor without the knowledge or consent of the Surety; which extension was not made pursuant to any reserved power in the contract..... 62–81

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NOTE.

The unusual length of this Brief (94 pages) is not due to hasty or defective preparation. But the record is very confusedly arranged and printed, and counsel have stated fully the separate defenses with quotations from the record and one controlling authority (*U. S.* v. *O'Brien*, 220 U. S. 321).

We have, for the Court's convenience, reprinted in the Appendix the opinions in *U. S.* v. *O'Brien*, 220 U. S. 321; s. c. *Farrelly* v. *U. S.*, 159 F. R. 671; *U. S.* v. *O'Brien*, 163 F. R. 1022; and also *U. S.* v. *Stone, Sand & Gravel Co.*, 177 F. R. 321, with our comments in parallel columns.

It is hoped this will lighten instead of add to the labor of the Court.

STONE, SAND & GRAVEL CO., and AMERICAN SURETY CO. OF NEW YORK,
Plaintiffs in Error.

vs.

UNITED STATES,
Defendant in Error.

in error to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR.

This case involves the right of the United States to recover from a contractor and its surety, $228,201.91 as the *excess cost of completing* a dredging contract, over the original contract price, where on the day after the time fixed for beginning work, the United States annulled the contract, because of the contractor's

failure to begin work the day before; and it thereby prevented the contractor from further trying to perform. The United States relet the work on more onerous terms at a naturally higher price; and it now seeks to recover from the original contractor such increased cost of completion.

The facts are undisputed and nothing is involved except pure questions of law arising under the construction of the Standard U. S. Government Engineering contract "Form 19" which is the same "Form 19" that was construed in *U. S.* v. *O'Brien*, 220 U. S. 321.

The plaintiffs in error contend that *U. S.* v. *O'Brien*, 220 U. S. 321, is a controlling authority and rely on it to reverse the case. For convenience, the opinion in the *O'Brien* case, 220 U. S. 321, is reprinted in full at page 140, *infra*.

* * * * * *

The **United States** sued the **Stone, Sand & Gravel Co.** as principal, and the **American Surety Co.** as its surety, for $228,201.91, being the excess cost of completion (over the contract price) of the dredging contract; and the trial Court directed a verdict in favor of the defendants (R. 23, 27).

The Circuit Court of Appeals for the Fifth Circuit (but, it is fair to say, before *U. S.* v. *O'Brien*, 220 U. S. 321 had been decided) reversed the judgment and peremptorily directed that a judgment be entered in favor of the United States (R. 37, 38; *U. S.* v. *Stone, Sand & Gravel Co.*, 177 F. R. 321). A *pro forma* new trial was had on the same evidence, and a judg-

ment entered in favor of the United States (R. 41, 43, 44);* which was affirmed *per curiam* (R. 205; *Stone, Sand & Gravel Co.* v. *U. S.*, 195 F. R. 68).

This writ of error was then taken (R. 207).

The questions are quite similar to those arising in the *O'Brien* case, and may be thus summarized:

> 1. When, because of a Contractor's default, the United States (acting under the so-called "annulment" clause) refuses to perform further and keeps the retained percentage (which the annulment clause forfeits to the United States) is it not limited to such liquidated damages, or may it recover the excess cost for completing the work?
>
> 2. Was or was not the extension of time in this case granted to the contractor for reasons authorized by the contract or bond?
>
> 3. Is the cost of completing the work under a new and more onerous contract a proper measure of damages.

STATEMENT OF THE CASE.

The contract and bond sued on.

On June 14, 1899, the Stone, Sand & Gravel Co. (hereafter called the Contractor) by contract with the United States, agreed to excavate 7,500,000 cubic yards of earth at 8.49 cents per yard; to *begin* active

*The judgment was for $221,952.91 against the Stone, Sand & Gravel Co., but for only $75,000 against the American Surety Co., as that was the penalty of its bond.

Although the United States sued for the full excess cost of completion, the Circuit Court of Appeals directed that a credit be allowed for the amount ($6,206.69) earned by the Stone, Sand & Gravel Co. for certain permissive advance work done before the regular date to begin (R. 38).

operations on or before December 5, 1899, with a plant having an excavating capacity of 260,000 yds. per month; and to increase the capacity to 300,000 yards per month by June 5, 1900;* *provided* that if the Contractor chose to begin work *before* December 5, 1899, such permissive work must be with an initial assured capacity of not less than 65,000 yds. per month up to December 5, 1899; and thereafter with the contract capacity of 260,000 yds. per month (R. 62, 63).

On June 15, 1899, the American Surety Co. (hereafter called the Surety Co.) executed a $75,000 bond conditioned for the faithful performance of the contract (R. 101, 102).

The Contractor's performance under the contract.

On Sept. 1, 1899, the Contractor began work under the permissive clause, expended nearly $100,000 getting started, and thereafter excavated 73,106 yds. which at the contract price of 8.49 cents amounted to $6,206.69; but as it did not excavate 65,000 yds. per month, the Government temporarily retained the $6,206.69 earned, under a contract clause to that effect (R. 10, 65, 134, 195).

Extension of time for beginning work with 260,000 yds. capacity.

On November 25, 1899, the Contractor made a written application to the United States for a fifty days' extension of time (from December 5th, 1899, to January 24th, 1900) within which to begin work with

*There was no provision that the Contractor should actually work at these rates.

the 260,000 yds. monthly capacity; and as a valuable consideration for the extension, proposed that if it were granted, it would so increase its plant as to do the work thereafter " far more rapidly" than the contract required (R. 173-178).

On December 2, 1899, the United States granted the extension requested, explaining that it (R. 3, 68, 148, 194)

> "modifies the foregoing paragraph [of the contract] by changing the words 'on or before the fifth day of December, 1899,' to 'on or before the twenty-fourth day of January, 1900' ".*

During December, 1899-January, 1900, the Contractor continued its efforts to assemble a plant of the necessary size spending a large amount of money on its plant (R. 134, 137, 140-142); but on January 17th, 1900, Maj. Casey (U. S. Engineer in charge) telegraphed the Contractor that he had "recommended that your contract be annulled and work readvertised" (R. 141). This shows that the United States was preparing to exercise its right to annul the contract on the very first day it could lawfully do so, to-wit, January 25th.

The Contractor urgently requested further time, and represented that it was prepared to carry on the

*This extension of time and change of contract was made without the actual knowledge or consent of the surety (R. 154, 156, 164, 166, 170); and it is the surety's contention that the extension was made in *violation* of the only clause in the contract whereby its consent was given in advance to any changes. (See p. 63 *et seq., infra.*)

The only reserved authority for extending the time was when the delay was caused by "*freshets, ice* or other force or *violence of the elements* and by no fault of his or their own"; none of which causes existed here.

contract to completion and would shortly have the full plant in operation (R. 135-138, 141, 142).

January 24, 1900, arrived without the Contractor having installed a plant of 260,000 yds. capacity (R. 151).

Annulment of contract for failure to begin work on January 24, 1900, with 260,000 yds. capacity.

On January 25, 1900—the very next day—the Chief of Engineers (as the contract required to make the annulment effective), sanctioned the annulment of the contract (R. 3).

The Contractor sent its representatives to Washington to interview the War Department and Engineer Department, to prevent the annulment and get an extension of time (R. 142).

On February 3, 1900, the Contractor made a written application to Elihu Root, Secretary of War, protesting against the annulment and requesting a short extension of time within which to begin with the contract capacity (R. 143-146).

On February 13, 1900, the Chief of Engineers reported adversely on the Contractor's request, and reiterated his recommendation (R. 96-97),

> "that the extension be not granted, but that the contract be annulled".

On February 15, 1900, the Secretary of War approved the recommendation "that the contract be annulled and the work readvertised" (R. 98).

On March 7, 1900, the United States notified the

Contractor and the surety that the contract was annuled, by the following letter (R. 155).

"VICKSBURG, Mississippi, March 7, 1900.

STONE, SAND & GRAVEL CO.,
New Orleans, La.

GENTLEMEN:

As you have *failed to prosecute* the work of excavation for diverting mouth of Yazoo River, near Vicksburg, Miss., in accordance with the specifications and requirements of the contract entered into by you June 14, 1899, *the said contract hereby is annulled;* this action having received the sanction and approval of the Secretary of War and of the Chief of Engineers, U. S. Army.

Very respectfully,
THOS. L. CASEY
Major, Corps of Engineers."

But even then the Surety Co. was not apprised of the extension that had previously been given (from Dec. 5 to Jan. 24), and did not learn of it until this suit was instituted in 1904 (R. 160, 161).

Contract re-let at an increased price.

On July 20, 1900—some four months later—the United States made a contract on Form 19*a* (hereafter called the new contract) with the Atlantic Gulf & Pacific Co. to excavate 7,500,000 cubic yards of earth at 12.4 cents per yard. Under that contract (which, as will be hereafter seen, p. 84 *et seq., infra,* was very different in various particulars from that with the Stone, Sand & Gravel Co.) the Atlantic Gulf & Pacific Co. excavated 5,836,366 yards at a cost of $723,709.38.

Excess cost to the United States:

Actual Cost:	
Atlantic, Gulf & Pacific Co.—5,836,366 Yds. @ 12.4¢ =.....	$723,709.38
Contract Price:	
Stone, Sand & Gravel Co.—5,836,366 Yds. @ 8.49¢=.....	495,507.47
Excess Cost to the United States	$228,201.91
Deduct:	
Stone, Sand & Gravel Co. had excavated 73,106 yds. @ 8.49¢ which the United States had retained and not paid over.....	6,206.69
Net excess cost to the United States.	$221,995.22

Institution of the present suit:

On August 31, 1904, the United States filed the present suit against the Contractor (Stone, Sand & Gravel Co.) seeking to recover the full $228,201.91 excess cost; and against the American Surety Co. as surety, for the $75,000, penalty on the bond (R. 4).

The petition alleged the bare execution of the contract and bond; that an extension was granted until January 24, 1900, within which "*to begin* said work"; that (R. 3)

> "upon the *failure* of the said Stone, Sand & Gravel Co. *to prosecute* the work within the term of the final extension granted, the chief of Engineers of the United States Army did, on the 25th day of January, 1900, recommend that the contract be annulled and the work re-advertised and re-let; that subsequently said

> recommendation was approved by the Secretary of War of the United States and the contract of said Stone, Sand & Gravel Co. was annulled."

that thereafter the United States made a contract with the Atlantic Gulf & Pacific Co. to do the work at an increased price of 3.91 cents per yard; that 5,836,366 yards were excavated at an excess cost of $228,201.91 over the Stone, Sand & Gravel Co.'s contract price, for which excess cost judgment was demanded; the prayer for judgment against the Surety Co. being limited to $75,000 penalty of its bond.

It is important to observe (1) that the *only* breach assigned is the failure to *begin* work by January 24, 1900; and (2) that the damages sought for the *first day's* breach in the time of *beginning* work, are the actual excess cost ($228,201.91) of doing the entire work under the new contract!

Does a breach in failing to *begin* work on time, entail $228,201.91 as damages, when the original contractor *did not abandon* the contract, but the employer annuled it for such breach?

The defenses of the Contractor and the Surety Co. may be thus briefly summarized (R. 10-20).

First: That the surety was released by a change in the contract between the Contractor and the United States, to wit: the 50 days' extension of the time of beginning from December 5, 1899 to January 24, 1900; because this change was made without the surety's consent, and was not made pursuant to any power reserved in the contract to change its terms.

Second: That the contract gave the United States the right to annul (*i. e.* refuse to perform further) the contract for the failure to begin work strictly on time —a right not possessed except for a specific clause conferring it; and prescribed that upon annulment the contractor should forfeit his retained pay. As the United States exercised that right, its *damages* are, *by the contract itself, limited* to the money or reserved percentage then in the hands of the United States.

Third: That the differences between the original contract with the Contractor, and the re-let contract with the Atlantic Gulf & Pacific Co. are so material and onerous to the new contractor as to cause higher bids, that the cost of completion under the latter is no proper measure of damage for a breach of the former contract; and especially is the surety released by reason thereof.

The trial Court sustained these defenses on the first trial (R. 23).

OPINION OF THE CIRCUIT COURT OF APPEALS (177 F. R. 321).

The Circuit Court of Appeals (McCormick, Pardee, Shelby, *JJ.*) reversed the case; directed a verdict for the United States; and held as follows:

> I. That the contract provided for an extension of time to begin, and hence the surety had given its consent in advance to such an extension (177 F. R. 325, 326).
>
> II. That the United States on annuling the contract was entitled to recover the full excess cost of completing the work (177 F. R. 326).

III. That the original contract and the relet contract called for "substantially the same specifications and stipulations"; and that the differences between them were not sufficient to relieve the Contractor and the Surety Co. from the claim for the excess cost.

For convenience the opinion is reprinted in full at page 102, *infra*, in parallel columns, with our comments thereon.

The defendants relied on *Farrelly* v. *United States*, 159 F. R. 671; s. c. *U. S.* v. *O'Brien*, 163 F. R. 1022, but the Court declined to follow it and rested upon an erroneous interpretation of *United States* v. *Maloney*, 4 App. Cases (D. C. 505).

A *pro forma* new trial was had (in order to avoid the question raised in *Slocum* v. *New York Life*, 228 U. S. 364); a judgment was directed for the United States and a second writ of error was taken to the Circuit Court of Appeals (R. 43, 199).

SECOND OPINION OF THE CIRCUIT COURT OF APPEALS (195 F. R. 68).

As *Farrelly* v. *United States*, 159 Fed. 671; s. c. *U. S.* v. *O'Brien*, 163 F. R. 1022, had in the meantime been affirmed by the Supreme Court under the style of *U. S.* v. *O'Brien*, 220 U. S. 321, the Circuit Court of Appeals in a *per curiam* opinion tried to distinguish the *O'Brien* case, and adhered to its original views and affirmed the judgment.

A critical analysis of the views of the Circuit Court of Appeals will be found in connection with the reprinting of the opinions with our comments in parallel columns at page 102, *infra*.

Assignment of Errors (R. 208):

The seven errors assigned simply assert that the Circuit Court of Appeals erred in its opinion (necessarily followed by the trial judge on the second trial) in directing that a peremptory instruction be given in favor of the United States.

SUMMARY OF POINTS DISCUSSED.

1. The contract, as construed in U. S. v. O'Brien, 220 U. S. 321 means as follows, to-wit:

   Clause A: If the contractor (1) fails to begin work on the day specified or (2) fails (in the judgment of the Government engineer) to prosecute the work faithfully, then the United States may annul the contract, i. e., refuse to perform it further; in which event the United States may keep all money or retained percentages in its hands, but shall have no further damages.

   Clause B: On the other hand, if the contractor fails to complete the work by the time agreed on, whether such failure be due to (1) a repudiation or refusal amounting to an anticipatory breach or (2) abandonment after doing some work or (3) mere failure to complete though still working at the expiration of the contract period, then in either such event, the United States may recover the excess cost of completing the work (pp. 13-31).

2. When the United States annulled the contract and retained the $6,206.69 money or reserved percentage due the Contractor (which clause A authorized it to retain) then ipso facto the United States exercised the sole exclusive and entire right it had under the contract; and it cannot hold the Contractor liable for the excess cost of completing the work which it had by annulment prohibited the Contractor from further trying to perform (pp. 32-62).

3. The American Surety Co. was released by reason of the 50 days' extension of time (from December 5, 1899 to January 24, 1900), which the United States granted to the Contractor without the knowledge or consent

of the Surety; which extension was not made pursuant to any reserved power in the contract (pp. 62-81).

4. Even if defendants are liable for all the damages suffered by the Government, the $228,201.91 excess cost of completing the work under the Atlantic, Gulf & Pacific Co. contract is not the proper measure of damages, owing to vital differences between the original contract and the relet contract (pp. 81-94).

ARGUMENT.

FIRST POINT.

The contract, as construed in U. S. v. O'Brien, 220 U. S. 321, means as follows, to wit:

Clause A: If the Contractor (1) fails to begin work on the day specified or (2) fails (in the judgment of the Government engineer) to prosecute the work faithfully, then the United States may annul the contract, i. e., refuse to perform it further; in which event the United States may keep all money or retained percentages in its hands, but shall have no further damages.

Clause B: On the other hand, if the Contractor fails to complete work by the time agreed on, whether such failure be due to (1) a repudiation or refusal amounting to an anticipatory breach or (2) abandonment after doing some work or (3) mere failure to complete though still working at th expiration of the contract period, then in either such event, the United States may recover the excess cost of completing the work.

Instead of discussing general legal propositions concerning completion of contract, penalties or liquidated damages, etc., the first thing is *to determine the meaning* of the contract between the parties.

This case turns upon the rights of the parties under a standard printed form of contract prepared and in general use by the United States; and hence, in

case of doubt should be construed most strongly against it (*U. S.* v. *O'Brien,* 220 U. S. 321, 327, 328; *Noonan* v. *Bradley,* 9 Wall. 394, 407; *Garrison* v. *U. S.,* 7 Wall. 688, 690; *Royal Ins. Co.* v. *Martin,* 192 U. S. 149, 165; *Texas & Pacific Ry. Co.* v. *Reiss,* 183 U. S. 621, 626; *Christian* v. *1st Nat. Bank,* 155 F. R. 705, 709; *Farrelly* v. *U. S.,* 159 F. R. 671, 674; *Mt. Vernon Co.* v. *F. W. Wolf Co.,* 188 F. R. 164, 168.)

It is precisely the same clause that was construed in *U. S.* v. *O'Brien,* 220 U. S. 321; and the construction then given it should be either authoritatively controlling or conclusively persuasive here (*U. S.* v. *Harvey Steel Co.,* 227 U. S. 165, 166); and we shall frequently recur to what was decided in the O'Brien case as the most direct means of analyzing and disposing of the issues here presented for decision (*Id.*)

THE CONTRACT OF JUNE 14, 1899 (R. 62).

The contract provided that the Contractor should excavate 7,500,000 yards at 8.49 cents per yard and should commence active operations on or before December 5, 1899 (subsequently extended to January 24, 1900), with a sufficient force and plant for 260,000 yards monthly output, which should be increased to 300,000 yards on or before June 5, 1900 (R. 63, 195); *provided* that if work were begun *before* December 5, 1899, the plant first put into operation should have an assured monthly capacity of 65,000 yards, and work should not begin with less output (*Id.*); and that if in any month the work fell below the required output all pay should be withheld until the average was made up by future increased excavation (R. 65, 66).

The contract further provided* (R. 63).

CLAUSE A.

"If in any event the party of the second part shall *delay or fail to commence* with the delivery of the material or the performance of the work *on the day specified herein*, or shall, in the judgment of the engineer in charge, *fail to prosecute faithfully and diligently* the work in accordance with the specifications and requirements of this contract, then in either case, the party of the first part, or his successor legally appointed, *shall have power*, with the sanction of the chief of engineers, *to annul this contract* by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and upon the giving of such notice, *all money or reserve percentage* due or to become due to the party or parties of the second part by reason of this contract *shall be* and become *forfeited to the United States;* and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in Section 3709 of the Revised Statute of the United States, provided, however, that if the party (or parties) of the second part shall by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or

*The "lettering" of the clauses is for mere convenience of reference; and does not appear in the contract itself.

obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

Then in logical order follow three distinct clauses dealing with subjects that might naturally arise during the progress of the work, to wit: (1) changes in work, (2) cost of extra work, (3) liabilities for labor and material furnished.

Then, in chronological order, follows "Clause B", which deals with the rights of the parties as they shall exist (1) at the time fixed for the *completion* of the *contract* (*P. W. & B. R. Co.* v. *Howard*, 13 How. 307; *Quinn* v. *U. S.*, 99 U. S. 30; *Graham* v. *U. S.*, 231 U. S. 474); or (2) in case of an *abandonment* of the work by the Contractor before that time (*U. S.* v. *McMullen*, 222 U. S. 460).

CLAUSE B.

"It is further understood and agreed that *in case of failure* on the part of the party of the second part *to complete this contract as specified* and agreed upon, that all sums due and percentage retained, shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited and *also to recover* from the party of the second part, as part of said damages, *whatever sums may be expended* by the party of the first part *in completing* the said contract, *in excess of the price herein stipulated* to be paid to the party of the second part for completing the same."

CONSTRUCTION OF CLAUSES A AND B.

The proper interpretation of those clauses is the one naturally flowing from the language used, and the relative positions of the clauses with respect to the subject matter and the other provisions of the contract.

The Contractor and the Surety Co. submit that the following is the proper construction (*a*) from the language used, (*b*) in the light of reason, and (*c*) as construed in *U. S.* v. *O'Brien*, 220 U. S. 321:

A. From the Language Used.

First: That, under Clause A, if the Contractor failed either (1) to *begin* work on the day specified, or (2) thereafter, in the judgment of the engineer, to *prosecute* the work diligently, then and in either of such events the United States had the right *to annul* the contract, *i. e., refuse to perform further;* and upon such "annulment" all unpaid money or reserved percentage became forfeited to the United States (in effect as liquidated damages) *as its sole remedy.*

This is so, because the plain language is that (R. 63, 64):*

> "If, in any event, the Contractor shall delay or *fail to commence* with the delivery of the material or the performance of the work *on the day specified* herein, or shall, in the judgment of the engineer in charge, *fail to prosecute faithfully and diligently* the work * * * then, in either case, *the United States shall have power to annul this contract* by giving notice in writing to that effect to the Contractor; and

*For brevity, substituting the word "Contractor" for "party of the first part"; and "United States" for "party of the second part".

> *upon the giving of such notice,* all money or *reserve percentage* due or to become due to the Contractor * * * *shall be* and become *forfeited* to the United States".

No *other* remedy or effect is stipulated to flow from the "annulment"; and hence it should be deemed to be the *exclusive* remedy provided by the parties.

Second: That as Clause A did *not* contain any provision for charging the excess cost of completion against the Contractor, the Contractor should neither be charged with such excess cost (*U. S.* v. *O'Brien,* 220 U. S. 321, 327) nor receive the profit from a cheaper completion (*Quinn* v. *U. S.,* 99 U. S. 30, 32).

The work done after the annulment under such a clause as Clause A was done by the United States for its own gain or loss as the case may be, not for the Contractor (*Quinn's case,* 99 U. S. 30, 32).

Third: As Clause A deals with the duty to *begin* work on the day specified, so the next three clauses immediately succeeding Clause A deal with (*a*) changes in plans "*during the prosecution* of the work", (*b*) cost of "extra work or material *performed* or furnished" under the contract, and (*c*) liabilities "incurred in the *prosecution* of the work"; thus plainly showing that the consecutive position of the clauses corresponds logically and chronologically to the performance of the work;

Fourth: In natural and logical sequence, the next clause is Clause B, designed to cover the contingency that the work shall not be *finished* at the date fixed in the contract for its completion, either from (1) abandonment by the Contractor or (2) simple failure to finish, though still at work.

In such event, the United States is not only given the same right as was given in Clause A to retain the reserved percentages and any unpaid installments of the contract price, but further, instead of being *limited* to such retained sums as liquidated damages, the United States is given the additional right to recover all damages it suffered *in excess* of the forfeited sums, including the *actual excess cost* to it of completing the work.

This is so, because the language (omitting immaterial words) is so plain (R. 65);

> In case of *failure* on the part of the Contractor *to complete* this contract as specified and agreed upon, all sums due and percentage retained shall thereby be forfeited to the United States, and the United States *shall also have the right to recover* any or all damages in excess of the sums so forfeited, and also to recover, *as part of said damages, whatever sums may be expended by the United States in completing the said contract* in excess of the price herein stipulated to be paid to the Contractor for completing the same.

Despite the opinion of the Circuit Court of Appeals that Clauses A and B meant substantially the same thing (177 F. R. 321, 327), they so clearly mean different things, and this Court has expressly so held (*U. S.* vs. *O'Brien*, 220 U. S. 327, 328), that argument is needless further than to repeat that in the one case (Clause A) the remedy is limited to a forfeiture of the retained percentage (*U. S.* vs. *O'Brien*, 220 U. S. 321, 327); while in the other case (Clause B) not only is the reserved percentage forfeited, but the United States is expressly given the *further* right (1) *to all damages* it may suffer by the Contractor's

default, including (2) the *actual excess* cost of completion (*Id.*). In other words, under Clause B, in event of a failure *to complete* the work by the specified date, the United States is given three cumulative remedies, (*a*) to keep all the retained percentages, (*b*) to recover all damages in excess of the sums forfeited, and (c) to complete the work and recover the excess cost of completion.

The complete difference between (1) the single remedy given in Clause A for a failure *to begin* on the day specified or to work *fast enough*, and (2) the several remedies given in Clause B for a failure *to complete* the work on time, is too obvious for further argument.

Clause A applies to (1) a failure *to begin "on the day specified"* and (2) a failure to prosecute the work to the engineer's satisfaction; in either of which events, the United States may annul the contract and keep all retained percentages, which is the only remedy conferred on annulment.

Clause B on the other hand, applies to (1) a voluntary *abandonment* by the contractor after beginning work but before completion, and (2) *a failure to complete* the work at the date specified; in either of which events, there is *no* annulment,* but the United States is given the right (1) to keep the retained percentages, and (2) to recover all damages in excess thereof, including the excess cost of completion.

*That is what this Court meant in *U. S.* v. *McMullen*, 222 U. S. 460, 471, and *Graham* v. *U. S.*, 231 U. S. 474-477, when it said that in those two cases the action of the United States in annulling the contract *after the date fixed for completion*, was not an annulment under Clause A at all, but was "merely a ceremony to mark the point of default".

So construed the contract is plain and consistent, and covers every conceivable contingency.

Before applying this construction of the contract to the facts of the case at bar, it will be useful to consider its construction in the light of reason and of the decisions of this court.

B. In the Light of Reason.

The United States would have had no right to rescind or refuse to permit the Contractor to perform further, merely because he did not *begin* on Jan. 24, 1900, or even because he was slow and it seemed likely he had taken too big a job and could not complete it within the contract time. The law is well settled on this point.*

*In the case of a building or construction contract running over a considerable period, the mere *time of beginning* is ordinarily not of the essence of the contract; and a mere failure *to begin* work on the specified day does not justify the owner in rescinding the contract or in refusing to perform further (*Kennedy Town Co.* v. *1st National Bank*, 136 S. W. 558; 4 *Elliott* on Contracts, §3712.)

The owner has no right to rescind or refuse to perform further merely because of the apparent inability of the contractor to be able to complete the work within the contract time; that is to say, a suspicion or likelihood, no matter how well founded, that the contractor will be unable to complete the contract according to its terms, *in the absence of an express provision to that effect*, affords the owner no ground for rescinding the same while the contractor is still undertaking to perform it. A contractor's mere inability to perform does not constitute an anticipatory breach for which the owner may rescind or abandon the contract or for which an action for the breach will lie, prior to the date fixed for the completion of the contract and while performance thereof is still being attempted by the contractor. Nothing but the contractor's express and absolute refusal to continue, coupled with the actual failure to perform, will justify the owner in rescinding or refusing to perform further prior to the date fixed for completion (*Dingley* v. *Oler*, 117 U. S. 490, 502-503; *Smoot's Case*, 15 Wall. 36, 49; Pitney, *J.*, in *Holt* v. *United Security Co.*, 76 N. J. Law 585, 21 L. R. A. (N. S.) 691, 695 and note; *King Iron, etc. Co.* v. *St. Louis*, 43 F. R. 768; 10 L. R. A. 826, 828 and note; *Brady* v. *Oliver*, 125 Tenn. 595, 41 L. R. A. (N. S.) 60, 67, with elaborate monographic note collating the cases).

That is why the United States inserted Clause A, viz.: to acquire a right it otherwise would not have possessed, namely, to annul the contract immediately the Contractor did not *begin* work on the day specified, or if, in the judgment of the Chief of Engineers, the Contractor was not prosecuting the work diligently enough (Wait's Engineering & Architectural Jurisprudence, §710 *et seq.*).

Having inserted Clause A for that purpose, the rights of the United States thereunder are limited to those specifically conferred, *i. e.*, to forfeit the money or reserved percentages in hand—no more, no less (*Farrelly* v. *U. S.*, 159 F. R. 671, 675).

The purpose of Clause B was to give the United States (either on the abandonment by the Contractor or upon his failure to complete within the contract time) the right not only to retain any moneys on hand, but to recover all damages including the *actual excess cost* of completing the work under a re-let contract (*Baer* v. *Sleicher*, 153 F. R. 129, 132); and thus fix clearly the measure of damages.

It is thus seen that there was a clear purpose in the use of Clause A to accomplish one end; and it is equally clear that there was a different purpose, for a different end, in the use of Clause B.

C. In the Light of U. S. v. O'Brien, 220 U. S. 321.

This form of contract has been construed but once by this court, to wit, in *U. S.* v. *O'Brien*, 220 U. S. 321, upon the very clauses now involved, which, as it is the controlling authority on which we rely, will now be reviewed.

Perkins & O'Brien (hereafter called the Contractor) made a contract on "Form 19" to excavate about 2,000,000 yards of earth, with the same Clauses A and B *verbatim et literatim* as here (see Transcript *O'Brien* case, pp. 14, 15).

They were to *begin* work by March 1st, 1899 and *complete* the work by July 1st, 1902. They began work on March 1st, 1899 and continued to work until January 1st, 1901, when the United States annulled the contract on the ground (as provided in Clause A) that in the engineer's judgment they were not prosecuting the work diligently, because in the preceding eleven months they had excavated only about 66,000 yards. At the time the United States had in its hand $8,300 retained percentages and amounts due, which it insisted became forfeited to it under Clause A.

The United States re-let the contract on Form 19*a*, the same as it was re-let to the Atlantic Gulf & Pacific Co. in the case at bar; completed the work at an excess cost of $76,470 over the contract price; and then sued the contractor O'Brien and his surety, Farrelly, to recover the full excess cost of $76,470; at the same time insisting on retaining, in addition, the $8,300 retained percentages and amounts earned.

It was conceded that at the time of the annulment, the Contractor had practically collapsed, although still struggling on; and that the Government was fully justified in annuling the contract.

The trial court not only allowed the United States to retain the reserve percentages, but in addition, also

gave a judgment for the full excess cost of completion, amounting with interest to $92,000.*

Farrelly, the surety, and O'Brien, both appealed.

The United States contended (See briefs of Mr. Stimson U. S. Atty. and Mr. Denison, Asst. Atty. Gen.);

> I. That clause A not only gave the Government the right to annul the contract and to retain the reserved percentages, but, by its reference to R. S. § 3709, also gave the further right to recover as damages the *excess cost of completion;* and that the forfeiture of the reserved percentages was not an exclusive remedy, provided by the contract in case of a breach of Clause A, but was a mere *pro tanto* indemnity for any damages incurred.
>
> II. That independently of Clause A, the Government was entitled, by operation of law, to the excess cost of completion for the contractor's breach in not prosecuting the work diligently.
>
> III. That, in any event, there was a breach of Clause B in that O'Brien did not *complete* the work by July 1, 1902; and hence the Government was by the express terms of Clause B entitled both (1) to retain the reserved percentages and (2) to recover the excess cost.

Each of those contentions was considered and rejected by both the Circuit Court of Appeals and by this Court.

In *Farrelly* vs. *United States*, 159 F. R. 671, the Circuit Court of Appeals upon elaborate consideration,

*On the trial, the Government conceded a credit of $2,891.31 for the amounts earned; but insisted on its right to the $5,400 reserved percentages; and the lower court upheld the Government's contention (See original records and briefs in *Farrelly* v. *U. S.*, 159 F. R. 671, and in *U. S.* v. *O'Brien*, 220 U. S. 321).

reversed the judgment, and decided (see reprint of opinion, p. 140, *infra*):

First: That the United States had the right under Clause A to annul the contract, saying (p. 673):

> "It might frequently cause great embarrassment to the government if it should be required to wait till the day when the breach was complete, especially when the conduct of the contractor and the manner in which he was prosecuting the work indicated that he would not complete it on the day named. In order, therefore, to provide for such a contingency, the annulment clause was inserted, giving to the engineer officer the right to terminate the contract in advance of the time allowed for its fulfillment, whenever in his judgment the contractor may fail to prosecute the work faithfully and diligently. This clause, while no doubt necessary, is a drastic one. It allows the government to terminate the contract although—as was the case here—the contractor could easily have fully completed the work in the time yet left, had he mended his ways and been allowed to continue."

But that upon such annulment, the damages were *limited* to the reserve percentage; and *did not include the excess cost of completion*, saying (p. 674):

> "Since this clause [A] is thus drastic, and permits the government to terminate the contract while the contractor is still able to complete, and by such completion avoid a breach of its provisions, it might be expected that the damages to be assessed against him would not be so heavy as those provided for when he has actually failed to complete the contract as specified within the time allowed. Reference to the clause shows that it contains *no words* calling

for damages arising from *excess cost of completion*. It reads merely:

> Upon annulment "all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States."

It is assigned as error that the judgment entered against plaintiffs in error *included damages arising from excess cost of completion*, and in the opinion of a majority of the court the point is well taken. * * *

> The annulment clause * * * provides its own punishment for the negligent contractor, viz; exclusion from the work and forfeiture of all sums due him. * * *
>
> Moreover where the context specifically describes the consequences to the contractor, implication must be of the clearest to warrant any addition to the enumeration."

Second: That Clause A, by its reference to R. S. § 3709, did not give any right to damages beyond the reserve percentage, saying (p. 675).

> "It is further contended that the reference in the annulment clause to section 3709 of the Revised Statutes 'inevitably implies' a right to general damages beyond those stipulated for in such clause. We are unable to concur in this proposition. The reference to section 3709 may be sufficiently accounted for on the theory that the contractor is thus forewarned that in case of annulment he must leave the work at once, because his successor may be selected and sent there without the delay resulting from readvertisement. Moreover, where the context specifically described the consequences to the contractor, implication must be of the clearest to warrant any addition to the enumeration."

Third: That the United States could not recover for the excess cost of completion provided for in Clause B; and this for the reason that there was no breach of Clause B because the contractor could not be charged with "a failure to complete" by July 1, 1902, when prior to that time, the United States had annulled the contract and prevented him from further performing, saying (p. 673):

> "It will be seen that, in the event of a 'failure to complete the contract as specified and agreed upon,' all sums due and percentage retained are forfeited, and the United States is also entitled to recover all damages in excess of such forfeiture due to such failure including the excess cost of completion. Inasmuch as a stated time is given for completion, it would not ordinarily be possible to declare that there had been a failure to complete, until the time given for such completion had elapsed. * * *
>
> "Moreover, while in one sense it may be said that a contractor who fails to prosecute the work faithfully and diligently for part of the time allowed him is not doing what the contract impliedly requires him to do, nevertheless, where there is no clause in the contract directing that he shall perform some specified part of the work within some specified time, or even that he shall do some work each month, it can hardly be said that he has broken the contract just because he has been so slothful during the first half of the period allowed him that he will have to be very much more diligent during the remainder of the period, in order to fully complete the work on time. * * *
>
> "The general provision in the later clause for forfeiture and damages 'in case of failure to complete as specified and agreed upon' does not apply, because on January, 1901—a year

> and a half before the expiration of the time limited—there had not been a 'failure to complete,' and because the annulment clause does not refer to the later provision, but provides its own punishment for the negligent contractor, viz., exclusion from the work and forfeiture of all sums due him. If the rule for assessing damages were to be found in the general clause, it is difficult to understand why the draftsman dealt with that subject in the annulment clause. Being a form prepared by the party of the first part, and in the preparation of which the contractor took no part, any ambiguities in its language are to be construed against the party preparing it. But we find no ambiguity. The expressed intention is that exclusion and forfeiture of all money due him is the penalty which a negligent contractor must pay when his contract is annulled."

Upon the reversal a new trial was had, and a judgment rendered in favor of the defendants, which was affirmed in *United States* v. *O'Brien*, 163 Fed. Rep. 1022, the Court saying:

> "Upon the second trial the government amended the complaints by reducing the amount of its claims. This enabled defendants to include among the grounds upon which they moved for direction of verdict in their favor the following: 'The government having retained the penalty, which it was authorized to retain, has exercised the sole and exclusive and entire right it had under the terms of the contract.' The decision of the trial judge in granting this motion was in accord with the opinion of a majority of this Court as indicated in the former opinion. Judgment affirmed."

It is thus seen that the Court of Appeals in the *Farrelly* case construed the contract exactly as we

now contend for to wit: (1) that in case of annulment under the authority in Clause A, the damages were limited to the reserved percentages and that there could be no recovery for the excess cost of completion; and (2) that there was no breach of Clause B for failure to complete where the contractor while still willing to work had only been prohibited from further performing by the annulment of the contract.

U. S. v. O'Brien, 220 U. S. 321, is a Controlling Authority.

In *U. S.* v. *O'Brien*, 220 U. S. 321, the judgment was affirmed; and this Court decided that the annulment was proper, as it was solely due to "the fault of the contractors, which was very plain, and the only question is *what liability they incurred.*"

This Court then held (see opinion reprinted in full at page 140, *infra*):

First: That under Clause A the sole right upon the annulment was to keep the retained percentage, saying (p. 327):

> "The right to terminate the employment of the defendants coupled with a provision for monthly payments based upon the amount of material removed, and therefore of course giving little pay for little work, is the protection expressly stipulated, by the United States."

Second: That the reference in Clause A to R. S. § 3709 did not imply that the contractor was therefore liable for the excess cost of completion, saying (p 328):

> "It is true that the expression of the right to proceed to provide for the completion of the

> contract and the reference to Rev. Stat. § 3709, hardly belong in that part of the contract unless the defendants are liable for the expense, but the contract does not show technical accuracy enough to give this consideration great weight. If the United States wants more it must say so in plainer words."

Third: That there was no breach of Clause B (where the excess cost of completion was specifically provided for); and this because *there could not be a failure to complete* by July 1, 1902, when the Government had itself previously *annulled* the contract, saying (p. 327):

> "Again, the later paragraph that we have quoted, giving the right to recover expense of completing the work in excess of the original price, gives that right only 'in case of failure * * * *to complete* this contract as specified and agreed upon.' On their face these words mean failure to complete by July 1, 1902, *not failure to complete because turned off by the engineer in charge*, a year and six months before that time arrived, when competent persons still might do the job. *The earlier clause under which the so-called annulment took place provides for no such consequence, but only for a forfeiture of reserved percentages and money due.*"

From the foregoing review, we submit that the proper construction of Clauses A and B is as follows:

Clause A. 1. That the United States has the absolute right to annul, *i. e.*, refuse to perform further, the contract (*a*) if the Contractor fails to begin work on

the precise day specified for beginning, and (*b*) if, after beginning, the Contractor does not work satisfactorily in speed or quality—the government engineer being the sole judge.

II. That in the event of such contractual annulment, the Contractor forfeits all reserved percentages and other sums still due him, which sums are the liquidated damages stipulated to be compensation for such conduct by the contractor as justified an annulment; and the United States cannot recover any other or further damages.

Clause B. That (*a*) if the Contractor *abandons* the work before completion, or (*b*) if, at the date fixed for completion, the Contractor, *though still at work*, has *failed to complete* the work, then and in either such event the Contractor forfeits "all sums due and percentage retained" and the United States can recover whatever damages it has suffered in excess of the sums forfeited, *including the excess cost* of completing the work.

It now remains to apply that construction to the facts of the present controversy.

SECOND POINT.

When the United States annulled the contract and retained the $6,206.69 money or reserve percentage due the Contractor (which Clause A authorized it to retain), then ipso facto the United States exercised the sole, exclusive and entire right it had under the contract, and it cannot hold the Contractor liable for the excess cost of completing the work, which it had, by annulment, prohibited the Contractor from further trying to perform.

This follows as a corollary to the construction of the contract which we have endeavored to maintain.

The contract permitted the Contractor to begin work at any time, but (as extended) required him to begin on January 24, 1900, with a 260,000 yards plant. The Contractor began under the permissive clause even before December 5, 1899, and did work to the extent of $6,206.69, which sum the United States had in hand owing to the Contractor, who was continuing its endeavor to attain the required capacity.

On January 24, 1900, the Contractor had not abandoned the work, but had failed to attain the required capacity, with which it was required to begin.

On January 25th—the very next day—the United States annulled the contract.*

*The contract ran in the name of the Major of Engineers; and Clause A provided that he should have power "*with the sanction of the Chief of Engineers*", to annul it. The Major of Engineers had, a week previously (January 17th) notified the Contractor that he had recommended the annulment. The Chief of Engineers gave his sanction to it on January 25th. Major Casey refused then to let the Contractor do any further work (R. 137), but the formal notice of annulment was not served on the Contractor until March 7th—being held up pending the Contractor's appeal to the Secretary of War to let it continue the work.

The rights of the parties then became fixed.

What liability had the Contractor incurred?

We submit:

I. *Clause A (under which alone the annulment was authorized) did not authorize any recovery for the excess cost of completion; but, on the contrary, limited the right of the United States to a forfeiture of the retained pay.*

1. Until January 24th the Contractor was under no obligation to do anything. He had the right to be idle until then. Then, and not till then, did his first obligation, which was to *begin* work, with 260,000 yds. plant, arise (R. 63, 148, 195), viz.:

> "commence active operation under this contract on or before the 24th day of January, 1900, with sufficient force and plant for an output each calendar month of not less than 260,000 cubic yards per month".

The Contractor did not abandon or repudiate the contract, nor commit any anticipatory breach thereof. He simply did not begin with the required capacity, although protesting that he would begin shortly.

In the absence of an express provision on the subject, the United States could not have terminated the contract for such a breach in beginning, as the time of *beginning* is ordinarily not of the essence of such a contract (p. 21, *supra*).

But rather than leave that subject open to any controversy under the general rules of law, the United States prepared its own Clause A to cover just such a contingency as follows (R. 63):

> "If in any event the party of the second part shall delay or *fail to commence* with the delivery

> of the material or the performance of the work *on the day specified herein*, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, *then* in either case, *the party of the first part*, or his successor legally appointed, *shall have power*, with the sanction of the chief of engineers, *to annul this contract* by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and upon the giving of such notice, *all money or reserve percentage* due or to become due to the party or parties of the second part by reason of this contract *shall be and become forfeited* to the United States."

That is to say, when the Contractor failed to commence with the performance of the work on January 24th, 1900, the United States had the power to annul the contract, and all moneys earned but not paid (for work previously done under the permissive clause) were forfeited to the United States. Or, another and very plausible construction is to consider the permissive work as a "*beginning*", and to consider the failure to have the 260,000 yds. plant in operation on January 24th as a failure "to *prosecute* faithfully and diligently the work in accordance with the specifications and requirements of this contract", which likewise gave the United States the power to annul and forfeit the $6,206.69 money earned; and that is the *O'Brien* case exactly.

In either event, the United States had, by Clause A, made a *specific contractual provision* to cover *the very contingency* that arose; and, having there provided the

result to follow the annulment, it must be deemed exclusive.

Or, as said in the *Farrelly case*, 159 F. R. 671, 674,

> "Reference to the clause shows that it contains no words calling for damages arising from excess cost of completion. It reads merely:
>
> Upon annulment 'all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States'.
>
> It is assigned as error that the judgment entered against plaintiffs in error included damages arising from excess cost of completion, and in the opinion of a majority of the court the point is well taken. * * *
>
> The annulment clause * * * provides its own punishment for the negligent contractor, viz., exclusion from the work and forfeiture of all sums due him * * *.
>
> The expressed intention is that exclusion and forfeiture of all money due him is the penalty which a negligent contractor must pay when his contract is annulled * * *.
>
> Where the context specifically describes the consequences to the contractor, implication must be of the clearest to warrant any addition to the enumeration."

Or, as said on the second appeal (*U. S.* v. *O'Brien*, 163 F. R. 1022):

> "The Government having retained the penalty, which it was authorized to retain, has exercised the sole and exclusive and entire right it had under the terms of the contract."

Or, as said by this Court in *U. S.* v. *O'Brien*, 220 U. S. 321, 327, in affirming the above:

> "The right to terminate the employment of the defendants coupled with a provision for

> monthly payments based upon the amount of material removed, and therefore of course giving little pay for little work, is the protection expressly stipulated by the United States. * * *
>
> If the United States wants more it must say so in plainer words."

It follows, therefore, that the excess cost of completion is not recoverable under Clause A.

2. This conclusion is justified when we compare Clauses A and B on this point, by placing them in parallel columns, but omitting, for brevity, all immaterial words, and using "contractor" and "United States" for "party of the first part", etc., as follows:

Clause A (R. 63, 64).	Clause B (R. 65).
If the Contractor shall delay or fail to commence the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then the United States *shall have power to annul* this contract by giving notice; and upon giving such notice, *all money or reserved percentage* due the Contractor *shall be forfeited* to the United States.	In case of failure on the part of the Contractor to complete this contract as specified and agreed upon, all sums due and percentage retained shall thereby be forfeited to the United States, and the United States shall also recover all damages due to such failure in excess of the sums so forfeited, and *also recover* as part of said damages *whatever sums may be expended* by the United States *in completing the contract*, in excess of the price herein stipulated to be paid the Contractor for completing the same.

In Clause B (relating to a *failure to complete* the contract as agreed on) the United States there prescribed not merely the forfeiture of retained pay as in Clause A, but it specifically provided that it might recover from the Contractor all dam-

ages it suffered in excess of the sums forfeited, and, as part thereof, *the excess cost of completing the work.*

The fact that in Clause A the forfeiture of retained pay was *alone* prescribed, while in Clause B the same forfeiture was prescribed, and *in addition, the excess cost of completion*, shows clearly that a different result flowed from them.

Now, the United States prepared this form of contract and had used it for many years.

How can it be said that by such *different* language, the United States meant to say the *same* thing?

3. The same conclusion as to the meaning of the language is shown by a comparison of the language used in Form 19 (Stone, Sand & Gravel Co. contract) with that used in Form 19a* (re-let contract with Atlantic Gulf & Pacific Co.), Clauses A and B of which we print for convenience, in parallel columns, indicating in black type the differences between them.

*The United States has, *inter alia*, two Standard forms of construction contracts, to wit: "Form 19" (*O'Brien* v. *U. S.*, 220 U. S. 321) and "Form 19a*" (*American Bonding Co.* v. *U. S.*, 167 F. R. 910; *U. S.* v. *McGee*, 171 F. R. 206).

Form 19a* has the following notice printed at its top (R. 120):

> "To be used when the specifications *do not* call for liquidated damages".

From which, it is persuasive, to say the least, that Form 19 is one that calls for liquidated damages; and such has been the construction of the courts.

CLAUSE A.

Form 19

(Stone, Sand & Gravel Co.)

If in any event the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the chief of engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and upon the giving of such notice,

all money or reserve percentage due or to become due to the party or parties of the second part by reason of this contract shall be

CLAUSE A

Form 19a

(Atlantic Gulf & Pacific Co.)

If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein or shall, in the judgment of the engineer in charge, fail to prosecute faithfully, and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the chief of engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice.

all payments to the party or parties of the second part under this contract shall cease, and

all money or reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be

and become forfeited to the United States; and

retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above mentioned sums out of or from the money or reserve percentage retained as aforesaid; and upon the giving of the said notice

the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in Section 3709 of the Revised Statutes of the

the party of the first part shall be authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in Section 3709 of the Revised Statutes of the

United States; *provided,* however, that if the party (or parties) of the second part shall by

freshets, ice,

or other
force or violence of the elements,

and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract such additional time may
in writing

be allowed him or them

for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion has been the date originally herein agreed upon.

United States; *provided,* however, that if the party (or parties) of the second part shall by
epidemics
freshets, ice,
local or State quarantine restrictions,

force or violence of elements, or other unavoidable cause of delay,
and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract, such additional time may,

with the prior sanction of the chief of engineers,
be allowed him or them,
in writing
for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

This Form 19*a* was not specially drawn for this occasion, but was the regular printed blank "form adopted and in use by the Engineer Department of the Army" (R. 107; the same used in *U. S.* v. *McGee*, 171 F. R. 206, 207, and *Am. Bonding Co.* v. *U. S.*, 167 F. R. 910, 915).

This alternative Form 19*a* expressly provided in its "Clause A" that upon the contractor's failure to *begin* on the day specified or to faithfully prosecute the work, the United States shall (not only forfeit the retained percentage), but *recover the excess cost of completion;* thus introducing in Clause A a new provision which was not written in Clause A of the Stone, Sand & Gravel contract, but which only there appeared in Clause B.

This shows that in Form 19 the United States intended to *exclude* the cost of completion from Clause A; and only inserted it in Clause B, whereas in Form 19*a*, the United States intended to insert the excess cost of completion in both Clause A and Clause B.

The language of both contracts being the language of the United States, can it possibly be said that, although using *different* language and affixing *different* measures of damages, it meant to say *the same thing* in both contracts? It seems too clear for further argument that the United States meant something different in Form 19*a* from what it meant in Form 19; and that difference was that the excess cost of completion should not be one of the recoverable items under Clause A of Form 19. That being so, the United States cannot recover from the Stone, Sand & Gravel Co. the excess cost of completion upon annulment under

Clause A. No amount of argument can make the matter plainer than the mere statement of the comparison between Clauses A and B in Form 19 reinforced by the comparison with Clause A in Form 19*a*.

4. In response to the suggestion that the forfeiture of retained pay is a penalty and not liquidated damages, we submit:

a. In *U. S.* v. *O'Brien*, 220 U. S. 321, this Court sustained that precise language as liquidated damages and permitted the Government to retain it as such.

b. It is not necessary to distinguish the multitude of cases on the vexed question of when a sum forfeited is a penalty and when liquidated damages. All the cases are collated, classified and reviewed in the most elaborate monographic notes to *Crawford* v. *Heatwole*, 110 Va. 358; 34 L. R. A. (N. S.) 587; *Madler* v. *Silverstone*, 55 Wash. 159; 34 L. R. A. (N. S.) 1; *King Iron Co.* v. *St. Louis*, 43 F. R. 768; 10 L. R. A. 826; *K. P. Mining Co.* v. *Jacobson*, 30 Utah 115; 4 L. R. A. (N. S.) 755.

c. It is well settled since the decisions in *Sun Printing & Pub. Ass'n* v. *Moore*, 183 U. S. 642, 669, and *U. S.* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119, that the present doctrine in this court is to

> "allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of contract, and without proof of the damages actually sustained."

All the Courts have recognized that building or construction contracts are peculiarly fit subjects for upholding agreements as to stipulated damages, because of the difficulty in otherwise ascertaining the damages;

and, therefore, in such cases, it has not been material whether the parties called it a penalty, forfeiture or damages; for in either case the Court upholds it as liquidated damages, if the amount specified bears some reasonable relation to the possible damage and provided the sums are to be paid for default in some stipulation, and do not appear to have been imposed merely as a penalty for the violation of any of numerous conditions of varying importance.

Under these rules, and in view of the decision in the *O'Brien* case, no further argument is necessary to show that the agreement in Clause A of Form 19 was intended by the parties to be a stipulation for liquidated damages; a conclusion which is emphasized by the fact that the alternative form of contract, to wit, Form 19*a* contains at its head the following notice (R. 120):

> "To be used when the specifications *do not* call for liquidated damages."

This clearly shows that Form 19 *did* call for liquidated damages.

II. *As Clause A fixed the forfeiture of retained pay as the penalty to a contractor upon an annulment under conditions specified in Clause A, the United States can not claim an inherent right to further damages under Clause A.*

This proposition is self evident. Clause A gave the United States a right to annul and prescribed the penalty to the Contractor. The United States having (1) availed itself of the right to annul thereunder, and (2) retained the penalty there given it, can not now claim

adversely to Clause A and ask for other damages in addition.

As said in the *Farrelly case*, 159 F. R. 674, 675, Clause A

> "provides *its own punishment* for the negligent contractor, viz; exclusion from the work and forfeiture of all sums due him. The expressed intention is that exclusion and forfeiture of all money due him is the penalty which a negligent contractor must pay when his contract is annulled. Where the context specifically deplication must be of the clearest to warrant any addition to the enumeration".

Or, as said in *U. S.* v. *O'Brien*, 220 U. S. 321,327.

> "The right to terminate the employment of defendants coupled with a provision for monthly payments based upon the amount of material removed, and therefore of course, giving little pay for little work, is the protection expressly stipulated by the United States * * * *If the United States wants more it must say so in plainer words.* * * * The suit is upon the contract, but the United States asks more than, in our opinion, the contract gives".

As the United States drew Clause A and could have provided for both penalty and other damages, had it desired to do so, but did not do this, it must be held to its own contract; and it cannot now claim a species of damages which it deliberately *omitted* from Clause A; although the omission was not inadvertent, because it was expressly inserted in Clause B.

This is certainly a valid "argument from design".

III. *Clause B (which is the only clause in the contract permitting the United States to recover the excess cost of completion) never came into*

operation against the Contractor; and hence no recovery can be had under its provisions.

1. The petition does not assign any breach under Clause B. It does not refer to it nor to any of its provisions, directly nor indirectly.*

It is, therefore, no basis for a recovery in this suit.

2. Clause B provides that (R. 65).

> "in case of *failure* on the part of the party of the second part *to complete* this contract as specified and agreed upon" all sums due and percentage retained should be forfeited, and the United States shall recover all additional damages, including the excess cost of completion.

Clearly that clause never came into operation against the Contractor, as there was never any "failure

*The petition is really demurrable in that it fails to state any cause of action. It simply alleges that "*upon the failure* of the said Stone, Sand & Gravel Co. *to prosecute* the work within the time of the final extension granted" the United States annuled the contract, re-let the work at an increased price of $228,201.91, for which judgment is prayed.

Although the original and re-let contracts are filed as exhibits with the petition, none of their provisions are set out in the petition. It follows therefore that a mere falure to prosecute, i. e., begin work before January 24, 1900, followed by an immediate annulment of the contract does not *as a matter of law* (no provision of the contract *being set out, or referred to*) authorize the recovery of the increased cost of completion. For that reason alone, the defendant's demurrer ought to have been sustained. (Rec. 5, 8).

The failure of the trial court to enforce the important rule of pleading requiring the petition to set forth the provisions of the contract bearing upon the subject led to an error, the influence of which was thereafter felt, and the breach relied on, resulting in additional errors at every step in the subsequent hearing and argument of the case.

We have, however, instead of relying on the insufficency of the petition, preferred to argue the case on the broader ground that under the contract and proof, no recovery could be had.

to complete"; the contract having been annulled; and the petition does not so allege nor declare upon it.

The Contractor cannot be said to have "failed to complete" the contract "as specified and agreed on" when, in truth, the opposite party had, under the annulment clause, annulled it and thus *prevented* the contractor from further trying to complete it.

The Contractor might be liable for damages of some sort, but certainly not for a contract penalty for "failure to complete."

This precise point was decided in the *Farrelly* case, 159 Fed. 671,674, the Court saying,

> "The general provision in the later clause [B] for forfeiture and damages 'in case of failure to complete as specified and agreed upon' *does not apply* because on January, 1901—a year and a half before the expiration of the time limited—there had not been a 'failure to complete' ".

In *U. S.* vs. *O'Brien*, 220 U. S. 321, 327, the same thing was held, the Court saying,

> "Again, the later paragraph [Clause B] that we have quoted, giving the right to recover expense of completing the work in excess of the original price, gives that right only 'in case of failure * * * to complete this contract as specified and agreed upon'. On their face these words mean failure to complete by July 1, 1902, not failure to complete because turned off by the engineer in charge, a year and six months before that time arrived, when competent persons still might do the job. The earlier clause [Clause A] under which the so-called annulment took place provides for no such consequence, but only for a forfeiture of reserved percentages and money due."

As the result of the foregoing argument we submit that the Stone, Sand & Gravel Co. is not liable for the *excess cost of completing* work (which is absolutely the only thing the petition sues for).

As the *excess cost per se* is all the petition sues for, it is not necessary to consider whether there is any other form of damage which the United States might, under a different theory, have drafted a petition to recover. We need deal only with the one particular sort of damage the Government based its suit on.

IV. *The case of U. S. v. O'Brien, 220 U. S. 321, is controlling here; and there is no case decided by this or any other court to support a contrary view.*

It is important to have the salient facts clearly in mind with a view to determining into what category of adjudicated cases the present contract falls; and thus avoid false analogies arising from different contracts and dissimilar circumstances.

The present contract permitted the Contractor to begin work at any time, but required him to begin on January 24, 1900, with a 260,000 yds. plant. The Contractor began; he did *not* abandon the work at any time; he continued his endeavors to attain the required capacity; and kept begging to be allowed an opportunity to perform the contract; but not having attained it on January 24, 1900, the United States exercised its strict right under Clause A, annulled the contract for such failure, and re-let the work.

It is, therefore, very like *U. S. v. O'Brien*, 220 U. S. 321, where, under precisely the same con-

tract, the Contractor was required to begin work on March 1st, 1899, and to complete it by July 1, 1902, with the same provision (as here) for annulment, if in the judgment of the engineer the Contractor failed to diligently prosecute the work. The Contractor began on time and continued to work, but long before the time for completion had arrived, the United States exercised its right under Clause A to "annul" the contract, because in the engineer's judgment the contractor was not working fast enough; and the United States re-let the contract on Form 19*a* just as in the case at bar.

It was held that the United States *could not recover the excess cost of completion*, but was strictly limited to the forfeiture of the sums and retained percentages in its hands as authorized by Clause A.

In fact, the *O'Brien* case is a direct and controlling authority here in so far as it

(*a*) construed Clause A (including the reference to R. S. §3709) *not* to give as damages the excess cost of completion, but only the "forfeiture of reserved percentages and money due"; and

(*b*) construed Clause B not to apply where the failure to complete was due to a prior annulment under Clause A.

With those two points of *construction* authoritatively settled, the slight differences between the *causes* of annulment in the *O'Brien* and *Stone, Sand & Gravel Co.* cases become immaterial.

However, even those differences do not lead to any different result.

In the O'Brien case the Government annulled the contract because the contractors failed, in the judgment of the engineer, "to prosecute faithfully and diligently the work in accordance with the specifications", etc.; O'Brien having actually *begun* work at the time required, but subsequently collapsing and doing only 66,000 yds. in the last eleven months.

As the *O'Brien* case held that a failure to prosecute diligently caused no consequence but the forfeiture of retained pay because the contractor might still have completed the work on time, so *a fortiori* an annulment for failure to begin strictly on time should not forfeit anything more than retained pay, because, even more so than in the *O'Brien* case, the contractor would still have time to complete the contract within the proper time.

In the case at bar, the Government annulled the contract for the failure to *begin* work on the *precise day* specified—the two causes of annulment being recited in the same sentence in Clause A (R. 63, 64) with only the disjunctive "or" to separate them.

The Government may rely on the following expression by Mr. Justice Holmes in the *O'Brien* case, as indicating that O'Brien had committed no *breach* of the contract and hence, on annulment, should only suffer the forfeiture of pay as a penalty for his slothfulness (220 U. S. 321, 327):

> "The sole material express promise of the contractors was to complete the work by July 1, 1902 * * *. If the proviso for annulment be not construed to import a promise on the defendants' part, we are of the opinion that there is no ground to charge them with a breach of contract."

From which the Government may argue (as did the Circuit Court of Appeals, 195 F. R. 68, 69) that "there was no breach of contract" in the *O'Brien* case, while in the case at bar there was.

> "an utter failure on the part of the Contractor (Stone, Sand & Gravel Co.) to perform his contractual obligations, and the government, on that account, was compelled to re-let the contract to other parties.
>
> Bearing in mind this distinction we are of the opinion that the ruling made by this Court upon the first writ of error, is not in conflict with the views expressed by the Supreme Court in the O'Brien case" (R. 69).

To that suggestion, we respond:

The United States could not recover against O'Brien for two independent reasons:

> (*a*) Clause A under which the contract was annulled, provided for the forfeiture of retained pay, and hence did not justify the recovery of excess cost of completion.
>
> (*b*) O'Brien had committed no *breach* of contract; but was only *slow;* and by Clause A, the United States had provided it might annul for sloth, even if it did not amount to a technical breach of contract.

That is the obvious meaning of Mr. Justice Holmes' opinion, which, probably through its brevity, seems to have eluded the proper analysis by the Circuit Court of Appeals.

1. The language cited was the second of the two independent reasons why no recovery could be had under Clause A for excess cost of completion; but Mr. Justice Holmes equally points out that the *primary* rea-

son no recovery could be had under Clause A for excess cost of completion is that (p. 32)

> "It would be a very harsh measure to pronounce the contract broken when but for the prohibition of the United States the defendants might have done the work in time. The right to terminate the employment of the defendants coupled with a provision for monthly payments based upon the amount of material removed, and therefore of course giving little pay for little work, is the protection expressly stipulated by the United States. * * *
>
> The earlier clause under which the so-called annulment took place provides for no such consequence, but only for a forfeiture of reserved percentages and money due. * * *
>
> If the United States wants more it must say so in plainer words."

2. The Stone, Sand & Gravel Co. *did* commit a breach of Clause A in failing to begin on January 24, 1900 with 260,000 yds. capacity; but they are protected from liability for the excess cost of completion, by the *first* of the two reasons of Holmes, *J.*, in the *O'Brien* case.

3. Furthermore, there was not an "utter failure on the part of the Contractor to perform his contractual obligations", but only a failure *to begin* with a particular capacity on a *specified day*.

In fact, it would be far harsher to assess the Stone, Sand & Gravel Co. with $228,201.91 excess cost of completion for failure to begin on time than to have assessed O'Brien with the excess cost of completion when he, after working a short time, only fairly well, collapsed completely and when the time for completion was more than half over and he had done but a fraction of

the work; and the language of Mr. Justice Holmes is very appropriate here (220 U. S. 327).

> "In this case it was admitted that there was time enough left to finish the work under the contract when the defendants were turned off. It would be a very harsh measure to pronounce the contract broken, when, but for the prohibition of the United States, the defendants might have done the work in time."

When the contract was annulled, the Stone, Sand & Gravel Co. had the entire contract time left within which to finish the work and were protesting against the annulment on the ground that within a few months they would have a sufficient plant installed to redeem their promise (made when the extension was given them) to do "the work far more rapidly than has been anticipated or required" (R. 178).

Every consideration that applied to the relief of O'Brien, equally applies here.

REVIEW OF THE AUTHORITIES RELIED ON BY THE GOVERNMENT.

Wide differences in circumstances and in the contracts involved render unnecessary any detailed consideration of decided cases.

It is obvious that the present case is wholly different from those cases, where the employer annulled the contract because the Contractor, although still at work, had not completed the work by the time specified (*P. W. & B. R. Co.* v. *Howard*, 13 How. 307; *Quinn* v. *U. S.*, 99 U. S. 30; *Baer* v. *Sleicher*, 153 F. R. 129; *U. S.* v. *McGee*, 171 F. R. 206); or where the Con-

tractor failing to complete the work within the contract time, the employer refused to let him continue on it longer (*U. S.* v. *Gleason*, 175 U. S. 588); or, where, before the time for completion arrived, the Contractor having done some work, absolutely abandoned the work, and the employer waited until *after* the date specified for completion and then annulled it (*U. S.* v. *McMullen*, 222 U. S. 460; *Hayes* v. *Nashville*, 80 F. R. 641), or where, *after* the time for *completion*, passed, the Contractor abandoned the contract, left the work unfinished, and the employer then annulled the contract (*Graham* v. *U. S.*, 231 U. S. 474); or where the Contractor abandoned the contract *ab initio* and refused to do any work whatever (*U. S.* v. *Grosjean*, 184 F. R. 593; *Sparhark* v. *U. S.*, 134 F. R. 720; *Chesapeake Transt. Co.* v. *Walker*, 158 F. R. 850); or where the Contractor, while engaged on the work, abandoned and repudiated the contract before the time for completion (*Am. Surety Co.* v. *Woods*, 105 F. R. 741.*

The Review of A Few Cases Will Be Useful.

In *Quinn* v. *U. S.*, 99 U. S. 30, the contract contained a clause expressly authorizing the United States (in case of delay or inability to proceed) to take over and complete the work and deduct the cost from the

*It is equally unlike those cases where the Contractor abandoned the work because wrongfully interfered with by the other party (*Anvil Mining Co.* v. *Humble*, 153 U. S. 540), or where the employer stopped a contractor who was not in default (*U. S.* v. *Behan*, 110 U. S. 338), or where the employer annulled the contract while the contractor was in full prosecution of the work with no intention of abandoning it. (*Am. Bonding Co.* v. *U. S.*, 167 F. R. 910, 915.)

reserved percentage due the Contractor. Quinn failed to complete the work by the date fixed for completion, October 1st. Subsequently, the United States annulled his contract, relet the work, and actually did it at $33,000 less than the contract price. Quinn sued to recover his retained percentage and also the $33,000 upon the ground that the relet work was done at his risk of loss or profit, and if, when finished, it had cost the United States more than the contract price, he would have been responsible for the loss, and as it was done for less, he was entitled to the gain.

The Court held that he could not recover the $33,000, *because there was no express clause giving the United States the right to charge him with the excess cost of completion*, and that when the United States rightfully annulled the contract, it did not thereafter do the work for the benefit of Quinn, but for its own benefit; and that the saving, if any, was its and not Quinn's. It held that Quinn was entitled to recover the reserved percentage upon the ground that under the peculiar language of the contract, it was held neither as a forfeiture nor as liquidated damages, but merely as a security for the performance of the contract, and that as the Government had sustained no loss, but had actually made a clear gain of $33,000 by annulling the contract, Quinn was entitled to receive his reserved percentage.

If the United States had completed the Stone, Sand & Gravel work at a cost of $100,000 *less* than the contract price, the rule in Quinn's case would have prevented the contractor from claiming a dollar on that account; but, on the other hand, the reason Quinn

could recover his reserve percentage and would not have been liable for the excess cost of completion if there had been any, was that the Quinn contract did not contain a Clause B, but was drafted in a much more favorable way for the contractor than even Form 19.

Quinn stayed on the work until the date fixed for completion before he was put off. The Stone, Sands & Gravel Co. was put off the day after it was to begin work.

The *Quinn* case did not allow the defaulting contractor his reserve percentage upon any theory of relieving against a forfeiture, but because under the peculiar language of his contract, it was merely held as indemnity against loss; and there being no loss, but an actual gain to the Government, it was returned to Quinn.

In *Sparhawk* vs. *the United States,* 134 F. R. 720, the contractor agreed to furnish certain supplies to the Post Office Department during a fiscal year; the contract providing that if he failed to furnish them when ordered, the United States might purchase the articles in open market and *charge the excess cost to the contractor,* and might annul the contract.

The Postmaster-General gave orders for paper, which the contractor failed to fill. The Postmaster-General purchased it in open market, annulled the contract and sued for the excess cost. The Court properly held that the United States could recover the excess cost of such articles as it had ordered and which the contractor failed to supply; but it further held that as to the articles purchased *after* the annulment, the United States could not recover, because not having or-

dered the articles before the annulment, Stoever was not in default as to that, and having chosen to annul the contract, of course they could not hold the contractor upon it.

In *U. S.* vs. *McMullen*, 222 U. S. 460, the contract required the work to be completed on February 25, 1899, with a right to annul the contract (if in any month the progress of the work was such as to indicate it would not be completed on time), and to *"complete the work at the expense of the contractor"*—practically Clause A in the new or re-let contract, but very different from the Stone, Sand & Gravel Co.'s Clause A.

The United States did not exercise its right to annul; but some time *after the time for completion had expired* and the work was still unfinished, the United States wrote that it "annulled" the contract; the Government completed the work and sued the contractor for the excess cost of completion.

The Court held (1) that as the "annulment" was made *after* the time for completion had expired, it was a mere ceremony and amounted to nothing one way or the other; and (2) that the Government could recover the excess cost of completion (not under the clause above quoted, which only applied to an annulment *before* February 25th, 1899, but under the general rule applicable to breaches of contract), saying:

> "The next argument that seems to us to need a word is on the effect of the election of the United States to annul the contract, as it was said. The infelicity of the word annul has been adverted to and its meaning explained heretofore.
>
> If notice had been given *before* the final breach and abandonment, it would have meant

simply that the United States would proceed no further with the contractor under the contract, not that it rescinded or avoided it. *Philadelphia, Wilmington & Baltimore R. R. Co.* v. *Howard*, 13 How. 307, 340; *United States* v. *O'Brien*, 220 U. S. 321, 328.

At the time when the notice *was* given it was merely a ceremony to mark the point of default as a preliminary to employing someone else. The obligations of the contract, so far as applicable to a case of default, remained in full force. The United States had a right to get some one else to complete the work and to charge the defendants with the reasonable difference in cost. Indeed this right was expressly stipulated in the specifications, if during the progress of the work a board should recommend that the contract be 'annulled' on the ground that it would not be completed in time. The cost to the United States was the least for which it could get the work done under the conditions upon which the Government was bound to contract, and must be assumed to have been reasonable in the absence of any evidence to the contrary. *New York* v. *Second Avenue R. R. Co.*, 102 N. Y. 572. *Baer* v. *Sleicher*, 153 F. R. 129. It was less than the sum stipulated as liquidated damages. *Sun Printing & Publishing Association* v. *Moore*, 183 U. S. 642. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119."

The *McMullen* case is therefore not applicable here, because the right there given to recover the excess cost of completion arose, not as the result of an annulment under a Clause A, but arose at the time when a Clause B was applicable, to-wit: *after* the time for completion had *expired* and the work was unfinished, in which event the right of the United States was under the general rule to get someone else to complete the work

and to recover from the contractor the reasonable difference in cost.

In *Graham* vs. *United States,* 231 U. S. 474, the same rule was applied.

After the time fixed for the *completion* of the work had expired, the contractor, Graham, absolutely abandoned the work, leaving it unfinished. The contract contained Clause A in Form 19*a*, to-wit, giving a power to annul *and also to recover the cost of completion* (see Original Transcript of Record in *Graham* case, p. 58).

The time of completion having expired, the Superintendent gave a notice of annulment, had the work finished and the United States sued for the excess cost of completion.

Graham contended that the Superintendent was not authorized by his superiors to give the notice of annulment.

The Court held (1) that the notice of annulment was unnecessary—a mere idle ceremony, because the provisions for annulment, etc., apply *only* during the contract period; and (2) that *after* it expired, with the work unfinished, the United States was entitled to recover the excess cost of completion (not under the contract power to that effect), but under the general rule laid down in the *McMullen* case, to-wit:

> "to get some one else to complete the work and to charge the defendants with the reasonable differenec in cost."

The recovery, therefore, of the excess cost of completion in the *McMullen* and *Graham* cases is no authority for the recovery of the excess cost of completion in

the case at bar; because in the *McMullen* and *Graham* cases (1) the contract was wholly different from the Stone, Sand & Gravel contract, and was (in the *Graham* case, exactly, and in the *McMullen* case, substantially) like the re-let Clause A in Form 19*a*; and (2) the contractor voluntarily abandoned the work, refused to proceed further, the contract time for completion had expired, the United States completed the work at an increased cost, and was therefore entitled to recover such increased cost, *not under any Clause A or Clause B*, but under the general rule laid down in the *McMullen* case as applicable to cases of default, to-wit:

> "The United States had a right to get someone else to complete the work and to charge the defendants with the reasonable difference in costs."

That is a very different thing from the case at bar, where on the day after the time fixed for *beginning* work, the United States exercised its contract right to annul, for one day's delay, and then proceeded to relet the work at an increased cost. The present case must therefore be determined upon the rights arising under Clause A, and not under the rules applicable upon a voluntary abandonment by the contractor after the contract time for completion had expired, as was the case in the *McMullen* and *Graham* cases.

The Government relies upon *United States* vs. *Maloney*, 4 App. Cas. (D. C.) 505, which involved a contract on Form 19 containing both Clauses A and B. The contractor was required to begin work on May 16, and to complete the work on October 1st, but he wholly

failed and refused to begin work or to do any work whatever, although repeatedly urged to do so.

His conduct constituted a clear anticipatory breach, and the United States thereupon annulled his contract, completed the work and sued for the excess cost of completion. The Court held that under Clause B (construed exactly as we construe it), the Government was entitled to recover the excess cost of completion. The case was correctly decided. The so-called annulment of the contract was (as in the *McMullen* and *Graham* cases) really needless. It was not necessary for the Government to have annulled the contract under Clause A as preliminary to employing somebody else. In view of the contractor's absolute refusal to do the work, the Government was entitled to treat it as an anticipatory breach, bringing Clause B into operation, which, by its express terms, gave to the United States the right to recover the excess cost of completion.

The Government misconstrues the *Maloney* case, treating it as though the contract were only annulled for the failure of the contractor *to begin* on the day specified, whereas that is not the fact. The annulment was really an idle ceremony, for the Government's right of action arose, not by virtue of its annulment, but because the contractor *absolutely refused* to do the work, although urged to proceed; a very different case from here, where the contractor wanted to proceed, but was prohibited by the annulment.

If there were any conflict between the *Maloney* case and *U. S.* v. *O'Brien*, 220 U. S. 321, of course, the latter would prevail here, but in point of fact there is no conflict. When the contractor in the *Maloney* case

absolutely refused to do the work, although urged to perform, he was guilty of such an anticipatory breach as under *Roehm* vs. *Horst*, 178 U. S. 1, and cases there cited, gave the United States the right to consider itself absolved from any future performance of the contract, with the right to sue for the excess cost of completion, equally recoverable under Clause B or under the general rules applicable to defaults in contracts.

If the foregoing argument has been successful, it has established (1) that the Stone, Sand & Gravel Co. did not *voluntarily abandon* the contract as did the contractors in the *McMullen* and *Graham* cases; (2) that the Stone, Sand & Gravel Co. failed to begin work on the day specified and thereby the United States became entitled under Clause A immediately to annul the contract, and forfeit the amount then due, $6,206.69, which it did; (3) that the forfeiture of such sum was the limit given by Clause A as a penalty for the contractor's slothfulness; (4) that the United States cannot, under Clause A, recover the excess cost of completing the work, because such was one of the grounds for denying the United States that right in *U. S.* vs. *O'Brien*, 220 U. S. 321; (5) that Clause B (giving the right to recover the excess cost of completion) cannot be the basis of any right to recover for the simple reason as held in the *O'Brien* case, that there was no default for failure to complete by the day specified, when the United States had previously under Clause A annuled the contract and prevented the contractor from further attempting to perform.

We insist that the United States having annuled the

contract under Clause A, and retained the $6,206.69 (the sum earned up to that time by the Stone, Sand & Gravel Co.), cannot recover against it or its surety the further excess cost of completion; because it cannot do so under Clause B as there was never a *failure to complete*, and it cannot do so under the general rules, because it *terminated* the contract under its reserved power of annulment.

THIRD POINT.

The American Surety Co. was released by reason of the 50 days' extension of time (from December 5th, 1899, to January 24, 1900), which the United States granted to the Contractor without the knowledge or consent of the Surety; which extension was not made pursuant to any reserved power in the contract.

The contract provided that the Contractor should commence work on December 5, 1899, with a plant of 260,000 yards monthly capacity (R. 63).

On November 25, 1899, the Contractor wrote the United States asking that the time for beginning work be extended from December 5, 1899, to January 24, 1900—a 50 days' extension (R. 174-178).

The United States granted the extension without the knowledge or consent of the surety, who claims that the extension of time constituted a material change in the contract, thus creating a new contract which it had not guaranteed, and for the performance of which it was not bound; or as it is commonly expressed, the surety was released by the change in the contract.

The parties made the *time of beginning* of the essence of the contract, and a material factor thereof by providing in Clause A for the contract's instant annulment if work was not begun on the very day specified. That our insistence on the materiality of the time of beginning is not fanciful, is shown by the action of the Government in annuling the contract upon one day's default in beginning. This stringent provision as to time was tempered just this far and no further, to wit:

> "*Provided*, however, that if the party (or parties) of the second part shall *by freshets, ice or other force or violence of the elements, and by no fault of his or their own*, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

The italicized words express the only condition under which the extension of time for commencing the work can be granted.

With the contract in that shape, the American Surety Co. executed a $75,000 bond conditioned that the (Rec. 102)

> "Stone, Sand & Gravel Co. shall and will, in all respects, duly and fully observe and per-

> form all and singular the covenants, conditions and agreements in and by the said contract agreed and covenanted by said Stone, Sand & Gravel Company, to be observed and performed according to the true intent and meaning of said contract, and *as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same.*" (Our italics.)

Of course, if these italicized words in the bond mean that the surety gave its omnibus consent in advance to any and all extensions both for beginning work and for completing it, then this defense fails; but the italicized words have no such meaning.

They refer only to extensions granted for *completing* the work *under the conditions prescribed in the contract;* or at most, to extensions for both *beginning* and *completing* the work granted *for the reasons and under the conditions* prescribed therefor in the contract.

Remembering that both the contract and the bond were on printed forms 19 and J respectively, prepared solely by the United States, and that any ambiguities should be resolved against the Government, let us determine the exact meaning of the provisions in the contract and bond, and then see whether the extension was granted in accordance therewith.

1. The contract provided for an extension of time if the Contractor

> "shall by *freshets, ice or other force or violence of the elements, and by no fault of his or their own,* be prevented either from commencing or completing the work * * * at the time agreed upon in this contract."

The language is so plain that no interpretation is really needed. Additional time for beginning can only be allowed if two things concur (*a*) delays occasioned by freshets, ice, or other forces or violence of the elements, and (*b*) by no fault of the contractors.

Both those conditions must concurrently exist to authorize an extension of time. Even delay occasioned by freshets, ice, etc., would not authorize an extension of time if through the fault of the contractor in failing to take proper precautions or otherwise, he had contributed to the delay.

In *U. S.* v. *Gleason*, 175 U. S. 588, 600, this identical Clause A was contrued with reference to the time of completing the work.

The Court, after quoting the clause, and the lower Court's construction of it, said (p. 604):

> "We cannot accept this exposition of the language as sound. Rather do we interpret it to mean that, as between the United States and the Contractors, the latter were to be relieved from their contract obligation to complete the work within the time limited, only if, in the judgment of the engineer in charge, their failure so to do was occasioned *by freshets or other force of the elements, and by no fault of their own.* * * *
>
> The contract fixes the time within which the work must be completed, but provides that, in case failure to complete is providential *and* without fault, such additional time may be allowed as the engineer may judge to be just and reasonable". * * *
>
> But as they had agreed, in the contract as we have construed it, that the engineer was to decide whether the failure to complete was due to the force of the elements or to their fault. * * *"

2. Was the contractor prevented from beginning work "By freshets, ice or other force or violence of the elements and by no fault of his or their own"?

Certainly not.

The contractor was prevented from beginning simply and solely by his own fault in not having the proper knowledge, experience, and possibly, money, to gather the sufficient force and plant to do the work. The contractor made his bid on April 3 (R. 58); signed the contract on June 14 (R. 62); and thus had from 6 to 8 months in which to assemble the proper force and plant. It simply did not do so.

On November 25, 1899, the contractor wrote Maj. Willard, Corps of Engineers in whose name the contract ran, regarding the extension of time (R. 174, 178). There is not a word in the letter concerning freshets, ice, or other forces or violence of the elements, nor the slightest suggestion that the contractor was prevented from beginning work on account of any of those causes. The only excuse given for not being able to begin on December 5th, was that the contractor had bid without knowing what was the best machinery to use; that its plant was small; that it did not possess hydraulic or scoop dredges which were the proper machinery for the work; that it had contracted for a dredge and was at that late date overhauling and repairing its own plant so that it expected to have a capacity of 18,500 yds. per 20 hours, or nearly double the contract requirements, on which account it asked for an extension until January 24, 1900, for beginning work, *and as consideration therefor,* said,

> "We propose to make other additions to our plant as the work proceeds, with the intention

> and expectation of doing the work *far more rapidly* than has been anticipated or required".

In short, the contractor offered to greatly increase his plant *above* the contract requirements, if, in return, the Government would grant it a 50 days' *extension* of the time to begin. There was a clear change in the contract; and a change too, founded upon a valuable consideration, to wit: the contractor would do *more* than his contract required if the Government would grant him an extension of time.

The Contractor also assigned as a reason for his delay, that the dredge building shops were overcrowded with work and could not deliver machinery promptly, and that there had been six weeks yellow fever quarantine. The letter and the attached summary of the correspondence between the contractor and the dredge builders clearly shows that the delay in beginning work with the sufficient plant on December 5th, was due solely to the fault of the Contractor (1) in not having a sufficient plant when it made its bid, and (2) in its slowness in assembling a plant, as an extremely desultory, fragmentary and dilatory correspondence with dredge builders concerning its machinery (there being an almost complete cessation of efforts in that direction from June until September), is probably explained by General Wilson's report to the Secretary of War (R. 97)

> "that the representatives of this company *competed for work out of their class*, and have only *recently awakened* to the *magnitude* of the task they undertook."

It is too plain for further argument that the contractor was not prevented from beginning work

> "by freshets, ice, or other forces or violence of the elements and by no fault of its own",

but was prevented from beginning work with a requisite plant simply and solely because it *misjudged* the character and extent of the work it had contracted to do, and only awakened at the eleventh hour to that fact. It was certainly the fault of the contractors which even the incidental reference to yellow fever (a cause not provided for in the contract), is not sufficient to explain or excuse.

In *Simpson Bros. Corporation* v. *John R. White & Son,* 187 F. R. 418, 424, a building contract imposed a penalty for each day's delay in completion, with a provision for relief if the delay was occasioned "by cause beyond the control of the contractor".

The Court said that the failure to get material or make other necessary business arrangements was not a cause beyond the contractor's control, saying:

> "The mere failure to get material from one material man cannot be regarded as a cause of delay beyond the control of the contractor, unless the material be proved to be of such peculiar character that it is not otherwise procurable. The failure of a business arrangement made between the contractor and those who supply him with materials, or the failure of prompt delivery of materials ordered from a distance by carrier, is an ordinary business contingency to be provided for by the contractor, and the risk of delay from causes of this character cannot be thrown upon the owner under a clause of this kind by evidence of the mere occurrence of the fact, without additional evi-

> dence showing that the contractor was practically limited to a definite source of supply, and that he could not be expected under the requirement of reasonable diligence to procure his material elsewhere. A mere statement by a contractor that he was delayed by various causes such as those stated, without a specification and without a definite showing of the connection between the non-arrival of materials and the progress of the particular work in hand, amounts to little more than a mere apology, and is not an excuse. * * *
>
> The entire case of the plaintiff as to excuse for delays is weak, artificial, and unconvincing."

The extension, therefore, was certainly granted by the United States on its own responsibility, and in no sense under the reserved power contained in Clause A of the contract.

The Circuit Court of Appeals, in the case at bar, without the citation of authorities, summarily disposed of this defense in these words (177 F. R. 321):

> "The contract shows that the parties contemplated that the contracting company might, by causes beyond its control and by no fault of it, be prevented from commencing or completing the work at the time agreed upon, and provided that such additional time might be allowed it for the commencement or completion thereof as, in the judgment of the named officer of the government or of his successor, should be just and reasonable. *Under this provision,* which expressed in advance the consent of the surety, the first extension applied for was so far granted as to fix the time for beginning active operations under the contract at January 24, 1900."

It was *not* granted "under this provision".

That argument is a complete *non sequitur,* entirely

ignoring the fact that the contractor was *not* delayed

> "By causes beyond its control and by no fault of it"

and assuming that the extension was granted *for that reason,* whereas we have shown that such was not the case.

3. That such an unauthorized extension of time on so material a point releases the surety is well established by the authorities hereafter reviewed (pp. 75-80, *infra*).

4. The Government will doubtless contend, as indicated, page 64, *infra*, that the surety by its bond, gave an omnibus consent in advance to extensions of the contract, which therefore might be made for any cause and without regard to delay by freshets, ice, etc. The Government's argument is based upon the defeasance condition of the bond, that the Stone, Sand & Gravel Company should perform the contract according to its true intent and meaning (R. 102)

> "*as well during any period of extension* of said contract that may be granted on the part of the United States as during the original term of the same."

It will be observed that the defeasance condition is that the contractor will observe and perform all of the covenants, etc., agreed to be performed according to the true meaning of the contract, and *as well during any period of extension* as during the original term.

We submit:

(A) The context indicates that the period of extension referred to is an extension at the *end* of the

contract time for *the completion* of the work, to-wit: that the contractor would perform all of the covenants agreed to be performed (note the connective expression) *as well* during any period of extension *as* during the original term of the same; the bond having in special contemplation the provisions in paragraphs 34 and 42 of the specifications (R. 73, 80) relative to "an *extension* of the time allowed for *completion* of the work" on account of "hindrance and delays" in its prosecution which were clearly contemplated as possible by Paragraphs 34 and 42 of the specifications (R. 73, 80). But extension of time for *completing* the work on account of unforeseen hindrance and delays is a very different thing from an extension of time for *beginning* the work in the first place.

For extension of time for beginning work, the only possible excuse allowed was on account of freshets, ice, etc.; whereas it was quite natural to make a more liberal provision for extensions in completing the work on account not only of freshets, ice, etc., but for unforeseen "hindrance and delays" for which the Contractor might not be responsible. In short, the Government was not concerned with any reasons (except freshets, ice, etc.) that might prevent the Contractor from *beginning* work on time as that was his own look-out; but in the progress of a great work many things might occur, even acts of the United States itself that would necessitate or render desirable or equitable, an extension of time for completion.

If we have correctly construed the provision of the bond, to relate only to extensions of time in *completion*, then, of course, it does not apply to an extension of

time for *beginning* work; and the surety would only be deemed to have consented in advance to the extension of time for beginning, when granted in strict accordance with the provisions of Clause A relative to freshets, ice, etc.; which, as we have seen, was not complied with.

(B) If, however, a more liberal construction be given to the bond's phrase "as well during any period of extension in said contract that may be granted" so as to include extensions for *beginning* work it certainly must mean any period of extension that may be granted by the United States *in accordance with the terms of the contract authorizing extensions.*

The contract, Clause A provides for extensions for both commencing *and* completing work, while Paragraphs 34 and 42 of the specifications only contemplate certain extensions for completing the work. Therefore, the only conditions under which the United States was authorized to extend the time for beginning, was on account of freshets, ice, etc.; and consequently the consent which the surety gave in advance by the bond's provision above quoted, relates at most to extensions for beginning work occasioned by freshets, ice, etc.

If that be the true construction of the bond, the surety was undoubtedly released.

There was not a syllable of proof introduced, tending to show that the extension of time was granted on account of freshets, ice, force or violence of the elements, or anything whatever, except the fact that the Contractor had not assembled a sufficient plant, but promised, if given the extension of time, that it would

more than make it up by a rate of excavation in excess of the contract requirements.

If the Government's construction of the bond as granting an omnibus consent is correct, then it means that the surety agreed to be bound not only for the contract of June 14, 1899, on form 19, but for any modification thereof respecting extensions of time.

It is hardly conceivable that when the contract itself so carefully prescribed the conditions under which extensions should be given, the surety was intending to consent not only to extensions so granted, but to any other sort of extension that from time to time the Contractor and the United States might agree upon.

5. If then we are correct in our construction of the bond, viz., that the surety consented to advance to such extensions only as were granted in accordance with the terms of the contract, we have the case of an unauthorized extension of 50 days time for the beginning of the work, which in the very language of the United States (R. 194, 195)

> "modifies the foregoing paragraph by changing the words 'on or before the fifth day of December, 1899' to 'on or before the twenty-fourth day of January, 1900.' "

The parties expressly made the time of beginning a material point, *i. e.*, of the essence of the contract; a fact of which the Government took advantage by annulling the contract for a default in respect thereto; therefore it is obvious that the change in time was a change of a material clause, in a material particular.

It was not a mere *forbearance* by the Government

to exercise its right to annul, still leaving it free to annul at any time, say December 30th or January 10th; but it was a *definite agreed change* modifying the original contract to that extent, so that between December 5th and January 24th, the Government could not have annulled the contract because of the original failure to begin on December 5th.

Under such circumstances the authorities are conclusive that the surety is released.

Instead of reviewing a vast number of building and construction cases, where under a variety of circumstances it was held that the liability of the surety was *strictissimi juris,* and that any agreed change in the contract, however slight or apparently unimportant or even beneficial to the surety, released the latter, it will be sufficient to cite in the margin* a number of the leading cases; and our review will be limited to one or two cases on the point of time and the citation of a few others on the point that where the surety consents in advance to an extension of time or other changes in

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**U. S.* v. *Freel,* 92 F. R. 299, 306; *U. S.* v. *Boecker,* 21 Wall. 652 (1874); *U. S.* v. *Corwine,* Fed. Cas. No. 14871 (1860); *Truckee Lodge* v. *Wood,* 14 Nev. 293, 309; *Killoren* v. *Mehan,* 55 Mo. App. 427, 433; and *Eldridge* v. *Fuhr,* 59 Mo. App. 44; *U. S.* v. *Case,* Fed. Cas. No. 14732 (1879); *Zimmerman* v. *Judah,* 13 Ind. 286; *Morgan Co.* v. *McRae,* 36 Pac. 717; *Livingston* v. *Moore,* 41 N. Y. S125; *O'Neal* v. *Kelley,* 65 Ark. 550; *Miller-Jones, etc. Co.* v. *Fort Smith, etc. Co.,* 50 S. W. 508; *Martin* v. *Thomas,* 24 How., 315, 317 (1860); *Page* v. *Krekey,* 33 N. E. 311, 313 (1893); *Bank* v. *Ayres,* 16 Ohio, 683; *Pybus* v. *Gibb,* 6 Ellis & Blackburn, 902 (1856); *Bonar* v. *McDonald,* 3 H. L. Cas. 226; *Erickson* v. *Brandt,* 55 N. W. 62 (1893); *Mundy* v. *Stevens,* 61 F. R. 77; *Grant* v. *Smith,* 46 N. Y. 93; *Rowan* v. *Mfg. Co.,* 33 Conn. 1; *Bethune* v. *Dozier,* 10 Ga. 235; *Beers* v. *Wolf,* 116 Mo. 187; *Miller* v. *Stewart,* Fed. Cas. No. 9591; *Brennan* v. *Clark,* 45 N. W. 472 (1890); *Benjamin* v. *Rogers,* 126 N. Y. 60, 70 (1891); *Zeigler* v. *Hallahan,* 131 Fed. Rep. 205.

the contract upon certain conditions, those conditions must be strictly and literally complied with or the surety is released.

In *Reese* v. *United States*, 9 Wall. 13, the condition of a bail bond was that the defendant

> "should personally appear at the next regular term of the Circuit Court to be held in the City of San Francisco, *and at any subsequent term* to be thereafter held in that city."

Subsequently, without the knowledge of the sureties, the defendant and the Government stipulated that the trial should be postponed to be called at a subsequent term after certain civil cases, involving the same question, were disposed of.

After the civil cases were disposed of the defendant failed to appear, and suit was brought against the sureties on the bond. It was held that the sureties were released upon the ground that the stipulation released the defendant from its obligation to appear at the term following the next regular term and substituted therefor an agreement to appear at such subsequent term as was held after the decision of the civil cases.

This extension of time within which to appear, was held to release the sureties.

The Court said:

> "If, now, we apply the ordinary and settled doctrine, which controls the liabilities of sureties, it must follow that the sureties on the recognizance in suit are discharged. The stipulation, made without their consent or knowledge, between the principal and the government, has changed the character of his obligation; it has released him from the obligation with which

> they covenanted he should comply, and substituted another in its place * * *.
>
> And the law upon these matters is perfectly well settled. Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

In *Earnshaw* v. *Boyer*, 60 F. R. 528, Earnshaw bought the total output for one year of an Ore Company, and he sold a third of it to certain buyers to be shipped "in as nearly equal monthly proportions as possible". The defendant Boyer became surety for the buyers.

The Ore Company was slow in sending the ore, and so towards the end of the year, the principals (seller and Buyer) agreed that the buyer might have an extension of time of one month in taking the ore. The buyer not taking and paying for the ore, the seller sued the surety. The Court, Dallas, *J.*, held the surety was released, saying:

> "It is quite manifest that the parties understood this to be a new agreement, by which the definite time which they both supposed had been originally agreed upon for the completion of shipments was extended for one month. * * *
>
> The principals were dealing with a matter which concerned the surety as much as it did themselves, and yet (not considering this matter of reasonableness at all) they agreed upon

> an arbitrary time, without consulting him, in utter disregard of his right either to be made a party to any such agreement, or to have the question of reasonable time determined by judicial investigation. The case presented is not of acceptance by the vendees of shipments under the original contract, but of partial substitution for that contract of a binding agreement, which varied the rights of the parties. McHose & Sons, without the consent of the defendant, and in modification of the contract to which his undertaking related, assented to a definite time for completion of shipments; and this they did by positive contract with the plaintiff,—not by merely remaining inactive (*Samuell* v. *Howarth*, 3 Mer. 272-278)."

In *U. S.* vs. *Freel*, 186 U. S. 309, there was a contract to construct a dry dock. The United States and the contractor (without the surety's consent), made a supplemental agreement of August 17th, changing the docks location from the water line to 164 feet inland, and extending for eight weeks the time of completion on account of such changes.

The Court held that although the original contract provided for any desired change in "the plans and specifications", yet that a 164 foot change in the location of the dock was not a mere change in plans and specifications, and that the extension of time for completion on account thereof, was such a change in the contract as released the surety.

Nor is there anything to the contrary in *U. S.* v. *McMullen*, 222 U. S. 460, or *Graham* v. *U. S.*, 231, U. S. 474.

In the *McMullen* case (222 U. S. 460), the time fixed for completion was February 25, 1899. In Jan-

uary the contractor asked for an extension on account of storms, accidents, etc.; and on February 15th the United States extended the time of completion until December 30, 1899. The Court held the surety was not thereby released, but on the following ground, *which does not exist in the case at bar:*

This Court pointed out that while the bond contained no reference to an extension of time, yet that the *contract* did; that (different from *U. S.* v. *Freel,* 186 U. S. 309, and the case at bar) the *surety had signed the contract itself* (as well as the bond); and that (different from the case at bar), § 18 of such contract (quoted in full in *McMullen* v. *U. S.*, 167 F. R. 461) expressly provided that in case of "unavoidable accident, storm or other act of Providence" delaying the work, the contractor should give immediate written notice of how much it would delay the work, in default of which no extension of time would be recommended. This Court held that as a matter of *contractual construction,* § 18

> "Definitely contemplated what the nature of the work made manifest, that it might be necessary or very convenient to extend the time; that the sureties must be taken to have contemplated it also as permissible against themselves" (p. 469).

The Court further points out that if, on the other hand, the delay be considered an "avoidable one", then it fell within the scope of § 19 of the contract (likewise signed by the surety) which provides that in case of

avoidable delays, no extension of time would be recommended,

> "except on condition that the contractor make good any deterioration caused by such delay and bearing the additional cost of supervision and inspection by the Government, and other expenses caused by the failure of the contractor to fulfill his contract with the United States, according to its terms; and by granting the extension in time asked for there shall be reimbursed to the United States by the contractor, the amount of such additional charges, etc."

And again, as a matter of *contractual construction*, this Court held that § 19 directly contemplates and provides that even in the case of "avoidable delays" an extension of time can be granted upon the payment by the contractor of the cost of superintendence, inspection and other expenses occasioned thereby.

In short, in the *McMullen* case, this court held that the contract itself, which the *surety signed*, directly contemplated and provided for extensions of time both for avoidable and unavoidable reasons; and therefore, that the surety had consented in advance to extensions being made under those conditions.

There was no such provision in the Stone, Sand & Gravel Co. contract; and the only provision in the latter contemplating an extension of time for begining work, was in Clause A, which limited the right to an extension when occasioned by "freshets, ice, etc."

In *Graham* vs. *United States*, 231 U. S. 474, 478, the time for completion was extended and the surety was held bound, but this was because paragraph five of the

contract expressly provided that if the work were not completed at the stipulated time, the Government might

> "in lieu of annuling the contract under the preceding clause [*new* Clause A] waive the time limit and permit the party of the second part to finish the work within a reasonable period to be determined by the said party of the first part" (U. S.).

Of course, with such a provision in the contract, the surety had consented in advance that the time for completion might be extended.

In the case at bar, the surety consented in advance to an extension of time only when necessitated by freshets, ice, etc.

It is well settled that in such a case, in order to hold the surety to such advance consent, the conditions and stipulations surrounding the consent, must be strictly conformed with.

Northern Light Lodge vs. *Kennedy*, 72 Dak. 146; 73 N. W. 524; *Truckee Lodge* vs. *Wood*, 14 Nev. 293, 309; *Killoran* vs. *Meehan*, 55 Mo. App. 427, 433; *Eldridge* vs. *Fuhr*, 59 Mo. App. 44; *Stillman* vs. *Wickham*, 106 Ia. 597, 599; held under a variety of circumstances that where the surety had consented in advance to changes upon certain conditions (such as making a written agreement concerning the difference in the contract price necessitated thereby) the surety was released if there was the slightest departure from the conditions imposed, such, as for example, agreeing orally instead of in writing, to the changes in contract price.

On behalf of the American Surety Co., we submit

in conclusion that the contract time for beginning work was a material feature, so stipulated by the parties under penalty of instant annulment; that an extension of the time for beginning was therefore a material change in the contract; that the contract only authorized extensions of time when necessitated by freshets, ice, etc.; that the extension given was not occasioned by freshets, ice, etc., but was solely due to the fault of the contractor, who promised if granted the extension to compensate for it by increasing its plant to do the work even faster in the future than the contract required; and that such unauthorized extension between the United States and the contractor released the surety.

FOURTH POINT.

Even if defendants are liable for all the damage suffered by the Government, the $228,201.91 excess cost of completing the work under the Atlantic Gulf & Pacific Co. contract, is not the proper measure of damages, owing to vital differences between the original contract and the relet contract.

The Government's entire case is based on its right to recover the $228,201.91 excess amount it paid the Atlantic Gulf & Pacific Co., over the Stone, Sand & Gravel Co.'s contract price (R. 4, 128-133). The Government did not introduce a syllable of evidence except the two contracts and the amount paid the new contractor (*Id*); which was conceded to be $228,201.91 in excess of the original contract price.

The Contractor and Surety Co. insist that even if they are liable to the Government for damages on account of the Contractor's default, the excess cost of completion under the relet contract is not the proper measure of damage, and should have been excluded; and, *there being no other evidence whatever in the case*, a judgment for defendants should have been entered.

We concede that the proper measure of damages is the reasonable cost of completing the work which a defaulting contractor failed to do (*U. S.* v. *McMullen*, 222 U. S. 460, 467; *Graham* v. *U. S.*, 231 U. S. 474, 481). In those two cases it was the same work on the same specifications exactly as in the original contract.

But we insist that such completion must be made upon substantially the same terms and conditions as the original contractor agreed to do it; for the original contractor (and his surety) can be held liable only for the very work he contracted to perform and not for some other work nor even for the same work but to be performed under different and more irksome conditions. (*American Bonding Co.* v. *U. S.*, 167 F. R. 910, 915-922; *Chesapeake Transit Co.* v. *Walker*, 158 F. R. 850, 856-858; *U. S.* v. *Walsh*, 115 F. R. 697; *City of Goldsboro* v. *Moffat*, 49 F. R. 213, 216.)

In *United States* vs. *Weisberger*, 206 F. R. 641, 645, the Circuit Court of Appeals said:

> "The law is, we think, well settled that where the government undertakes to take over work contracted to be done for it, for some breach of the provisions of the contract, and itself perform the work, or employ a third party to do so, at the expense of the former contractor and

his surety, the work so to be completed, in order to hold the contractor or his surety for the excess of cost, *must be in substance the work that was contracted for*, and must be performed *without substantial departure from the contract* (*United States* v. *Freel*, 186 U. S. 309, 22 Sup. Ct. 875, 46 L. Ed. 1177; *American Bonding Co.* v. *United States*, 167 Fed. 910, 93 C. C. A. 310; *American Bonding Co.* v. *Gibson*, 127 Fed. 671, 62 C. C. A. 397; *United States Fidelity & G. Co.* v. *United States*, 194 Fed. 611, 116 C. C. A. 187; *Mundy* v. *United States*, 35 Ct. Cl. 265)."

It is well settled that if the work which the owner has completed is, as completed, different from that which was originally contracted for, then, and in such event, the difference in cost is *not* a proper measure of damages and no recovery can be had; or, as it is sometimes expressed, the surety becomes released (*Id.*; *U. S.* v *Weisburger*, 206 F. R. 641, 645; *U. S.* v. *U. S. F. & G. Co.*, 194 F. R. 611, 615, 617).

The new or relet contract with the Atlantic, Gulf & Pacific Co. (hereafter called the Pacific Co.), while for the same work, required it to be done under *more onerous* conditions, thus naturally inducing *higher* bids.

Obviously, the actual cost of completion under a relet contract is no proper measure of damage, if the relet contract contained requirements that would tend to make contractors charge more than under the easier terms of the original contract.

In short, the Surety Co. guaranteed the performance of the work at 8.49 cents under certain definite specifications, but the Surety Co. never did guarantee that the same work would be done for that price *un-*

der other and different specifications. Now the $228,-201.91 excess cost of completion was under other and different specifications and should not be considered a proper measure of the reasonable cost of completing the work whose performance the Surety Co. guaranteed; especially when it is seen that the changed specifications had an obvious and necessary tendency to make the new contract price very much higher than the original contract price.

A brief review of the differences between the old and new specifications will show that every difference tends to make the relet price much higher than the original price.

REVIEW OF THE NEW AND MORE ONEROUS CONDITIONS INSERTED IN THE RELET CONTRACT WITH THE ATLANIC, GULF & PACIFIC CO., WHICH OBVIOUSLY TENDED TO INCREASE THE COST OVER THE ORIGINAL CONTRACT PRICE.

I. One of the most important differences between the old and the new contract was in the change that was made in Clause A—the "annulment" clause.

Clause A of the old contract provided that upon the failure of the contractor to begin on the specified date or to faithfully prosecute the work thereafter, the United States should have the power to annul the contract and forfeit the reserved percentages; and in *U. S.* v. *O'Brien,* 220 U. S. 321, it was expressly held that in the case of annulment for failure to prosecute the work, the Government was limited to the forfeiture of the reserved percentage, and could not recover the

excess cost of completion; and therefore, in the *O'Brien* case the contractor and the sureties did not have to pay the $90,000 excess cost of completing the work, but only lost the $5,000 reserved percentage.

On the other hand, by Clause A in the new contract with the Atlantic, Gulf & Pacific Co., the United States provided that upon the annulment for failure to begin on time or to faithfully prosecute the work, the United States might recover,

(1) the excess cost of completing the work;
(2) cost of inspection and superintendence

The differences can be seen at a glance in parallel columns on pages 38-40, *supra.*

It needs no argument to show what a radical change was made between the old and the new contracts. The old contract was like the *O'Brien* contract; whereas the new contract expressly allowed a recovery for the cost of completing the work even if the contract were only annulled for slothfulness. If this new contract had been in the *O'Brien* case, the contractor and his sureties would have had to pay the $90,000 excess cost of completion.

Now, then, such a clause certainly would tend to make a contractor ask more for his work, and hence the cost under such a contract is no proper measure of damage for a breach of the old contract.

The surety has a peculiar right in this connection.

The surety guaranteed the Stone, Sand & Gravel Co.'s contract with the annulment Clause A so framed that, as held in *United States* vs. *O'Brien,* 220 U. S.

321, there would be no liability on the surety for excess cost of completion if the United States annulled the contract for the contractor's lack of faithfulness or diligence in the work. In fact, the surety would probably have the right to complete the old contract according to its terms. A surety might be very willing to guarantee the performance of that kind of contract with no liability for excess cost of completion (the only penalty being the forfeiture of the reserved percentage which was the contractor's money and not the surety's), whereas it might be wholly unwilling to guarantee the performance of a contract on the new Atlantic, Gulf & Pacific Co. form which expressly gave the United States the right to annul (as it did in the case at bar) the contract because the contractor did not begin on the identical day specified for beginning, and yet to recover the excess cost of completion by another contractor, where the United States having a solvent surety to look to, need not be particularly careful to get the lowest possible bid or even a reasonable cost.

After the United States had such a provision as *new* Clause A, it was not even limited to the *reasonable* excess cost of completion, but was entitled to recover the *actual* cost of completion whether reasonable or not (*Baer* v. *Sleicher*, 153 F. R. 129, cited with approval on this point in *United States* v. *McMullen*, 222 U. S. 460, 471).

A contractor would immediatedly see the difference between Clause A in the Stone, Sand & Gravel contract and Clause A in the Atlantic, Gulf & Pacific

Co. contract. He would know that under old Clause A, as construed in *U. S.* v. *O'Brien*, 220 U. S. 321, the sole penalty of a failure on his part to prosecute the work satisfactorily would be that the Government might annul his contract and retain the reserved percentage or other money due him; with equal distinctness he would perceive that under the *new* Clause A the Government might annul his contract at any time for his alleged lack of diligence and that in such event he would be subject not to the mere forfeiture of the reserved percentages, but to an indefinite unascertainable and perhaps enormous damage measured only by the future excess cost of completing the work by some other contractor. Would not such a provision so uncertain and so immense in its possibility, induce the contractor to make a higher bid than he would under the original contract? The very fact that the Government placed this new Clause A in the relet contract, was because it was not contained in the old contract and was deemed important to be inserted; and therefore by parity of reasoning, the Surety Co. when it guaranteed the original contract, was justified in assuming that in the event of default in the prosecution of the work, followed by annulment, its principal would be liable only for the reserve percentages and that neither the principal nor itself will be called on to respond to the excess cost of completion.

II. The relet contract contained the following completely new clause (R. 124):

> 10. The party of the second part further agrees to hold and save the United States harm-

> less from and against all and every demand or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract."

The subject was deemed so important that it was also covered by the following new clause in the *specifications* (R. 108):

> "34. The contractor will be required to hold the United States harmless against all claims for the use of any patented article, process or appliance in connection with the contract herein contemplated."

Its great importance may be judged from the fact that it is the *only one of the changes* that is put in *both* the new *contract* and the new *specifications;* so as to doubly protect the Government from infringing suits, to which subject the Government was very much alive (*Russell* v. *U. S.*, 182 U. S. 516, 535). The apprehension of damage from infringements arose from the free hand that was given contractors to use any "methods of excavation" they pleased "owing to the great development in methods" and "to encourage ingenuity" (R. 113).*

The fear of damage suits was a very real one, as *Belknap* v. *Schild*, 161 U. S. 10 had just been decided, holding Government officers liable for damages in

*See *Schillinger* v. *U. S.*, 155 U. S. 163, 172; *U. S.* v. *Palmer*, 128 U. S. 262; *U. S.* v. *Berdan Fire Arms Co.*, 156 U. S. 552, as illustrative of the reality of the danger of infringement suits being instituted.

tort for using patented inventions on United States property without the patentee's license (See on this subject *Crozier* v. *Krupp*, 224 U. S. 290, 302-305 for an historical review of the subject; *International Postal Co.* v. *Bruce*, 194 U. S. 601, 605; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619).

Obviously such an indemnifying agreement would tend to make the new contractor ask a higher price than he would without it.

III. The new contract (R. 121) required the Pacific Co. *to complete* the work in *30 months* (an average of 250,000 yds. a month for 30 months), under penalty of having the contract annulled, forfeiting all reserved percentages and being liable for the excess cost of completion by some new contractor.

The old contractor required a *plant capacity* of 200,000 to 300,000 yds., but *no time limit* for completion; there was no requirement that it must be operated at such maximum capacity. The possibility that the engineer in charge might annul the contract for failure to prosecute the work diligently, was the only factor bearing on the time of completion; whereas the new contract imposed an absolute time limit of 30 months, which required an average of 250,000 yds. for each month for 30 consecutive months, regardless of weather conditions, etc.

Geo. W. Catt, President of the Atlantic Gulf & Pacific Co., had just had the time limit enforced *against* him in the *McMullen* case (222 U. S. 460) when he was President of the contracting company; and hence

he was alive to the dangers and must have increased his bid accordingly.

IV. The new contract imposed a special cost on the contractor by introducing a new provision into Clause B, requiring that if the work were not completed on time (R. 122),

> "The said United States shall have the right to recover from the party of the second part all cost of inspection and superintendence incurred by the said United States during the period of delay, and also whatever sums may be expended by the party of the first part."

This was a definite added liability imposed on the contractor if he failed to complete the work within the 30 months. It tended to make his bid higher and Geo. W. Catt did not overlook such a point.

V. Both the old and the new contracts provided (R. 63, 121)

> "All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the government, and such as do not conform to the specifications set forth in this contract shall be rejected. *The decision of the engineer officer in charge as to quality and quantity shall be final.*"

The italicized words were essential in order that the engineer's decision should conclusively bind both parties (*Mercantile Trust Co.* v. *Hensey*, 205 U. S. 298, 308, 309, and cases there cited).

The "rigid inspection" of the work "before being

accepted" was to be made monthly as the work progressed so as to justify the payment of next month's estimate (Cf. R. 63, 65, 66, 76, 78).

The meaning of the italicized words was that when the United States Engineer Officer in charge had rendered his decision as to the quality and quantity of the work done up to that time, *such decision was binding on both parties.* (*Sheffield, etc., Railway Co. v. Gordon*, 151 U. S. 285, 292; *Chicago, etc., Railway Co. v. Price*, 138 U. S. 185, 194; *Martinsburg R. R. Co. v. March*, 114 U. S. 549, 551, 552; *United States v. Gleason*, 175 U. S. 588, 605; *Lord Bateman v. Thompson*, 2 H. B. C. 23.)

Therefore, under the old contract by the well-settled decisions of this Court, the decision of the Engineer Officer from time to time was conclusive, and the contractor was entitled to rely absolutely from month to month that the preceding work was properly done, properly calculated, and that there should be no "after clap."

In the *new* contract, however, the Government determined that *it would not allow* the contractor any such advantage; and the new contract contained the following additional and burdensome provision (R. 123, 124):

> "It is further agreed by and between the parties hereto that *until final inspection and acceptance of, and payment for*, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to *reject* any defective work or material or

to require the fulfillment of any of the terms of the contract."

There was no provision requiring this in the old contract.

Its effect (in connection with the other clause above quoted) was that while the engineer officer's decision month by month was conclusive and final as *against the contractor*, it was still open to impeachment or revision by the *United States* up to the final payment and completion of the whole work. In short, by inserting that new clause in the relet contract, the United States intended to reserve to itself that right of revision which the owner in *Lord Bateman* v. *Thompson*, 2 H. B. C. 23, and in *Chicago & Santa Fe R. R. Co.* vs. *Price*, 138 U. S. 185, 194, unsuccessfully tried to exercise, and which was denied to it both by Lord Coleridge and by this Court because of the clause making the engineer's decision final. In short, the United States reserved the right to have a reinvestigation, classification, measurement and inspection at the end of the 30 months of all the work that had gone before, and to require even at that late date, any of it to be done over which the engineer officer (perhaps a successor one) thought was defective or insufficient.

Such a provision was much harsher than the old contract and would tend to make the bidders under the new contract ask a higher price. It made the engineer officer's decision binding as against the contractor, but not binding against the United States, and left the

contractor in suspense as to whether his work was good or bad, full or short, until the whole contract was completed.

In the new contract, the United States imposed upon the contractor a guarantee that the work *as a whole*, should accomplish the purpose intended; and specified the very thing which in *Sheffield Railway Co.* v. *Gordon*, 151 U. S. 285, 292, this Court held could not be done under such a provision as appeared in the Stone, Sand & Gravel contract.

When one considers the amount of litigation in this Court on the effect of the conclusiveness of the engineer's decision and the rulings thereon, it is obvious that by the new contract the United States was stipulating for a valuable, important and substantial right that it did not possess under the Stone, Sand & Gravel contract.

The Surety Co., therefore, cannot be held liable for the cost of completing the work under a contract which it did not guarantee and which was so materially more onerous in its terms that the surety might well have refused to guarantee it.

This case is very different from *U. S.* v. *McMullen*, 222 U. S. 460, 471, 472, where the relect contract (the excess cost under which was held to be a proper measure of damages) actually gave the second contractor certain liberties of dumping material in deep water which actually *diminished* the cost.

The burden was on the Government, as plaintiff, to prove its damage; and when it offers as evidence thereof, the excess cost of completion, under a wholly different contract, it has failed to make out a *prima*

facie case; because it offered nothing to show that these changes (which obviously *might* increase the cost) had no such effect; and the United States made no proper allowance whatever in its evidence for such increased cost due to changes and more onerous conditions.

The cumulative effect of these differences is great. Possibly this Court might say that any one of the differences, standing alone, was not sufficient to destroy the integrity of the excess cost of completion as a true *measure of damages*, but can it so hold in view of these *five* radical changes?

If so, where would it draw the line?

CONCLUSION.

The judgments below should be reversed and the original judgment of the Circuit Court in 1908 should be affirmed; or a new trial awarded.

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Counsel for Plaintiffs in Error.

HENRY C. WILLCOX,
T. M. MILLER,
Of Counsel.

10 April, 1914.

APPENDIX

REPRINT OF OPINIONS IN

U. S. v. *Stone, Sand & Gravel Co.*, 177 F. R. 321

Stone, Sand & Gravel Co. v. *U. S.*, 195 F. R. 68

Farrelly v. *U. S.*, 159 F. R. 671

U. S. v. *O'Brien*, 163 F. R. 1022

U. S. v. *O'Brien*, 220 U. S. 321

OPINIONS

OF

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

IN

U. S. v. *STONE, SAND & GRAVEL CO.*, 177 F. R. 321

STONE, SAND & GRAVEL CO. v. *U. S.* 195 F. R. 68

WITH PARALLEL COMMENTS

BY

COUNSEL FOR PLAINTIFFS IN ERROR

PREFATORY NOTE.

We have printed the two opinions of the Circuit Court of Appeals in this case, with our comments and criticisms in parallel columns so that the Court may, at a glance, see the points of divergence.

The substance of the Circuit Court of Appeals' conclusions may be thus stated:

First: They hold that when the Stone, Sand & Gravel Co. failed to begin work with the requisite sized dredging plant on January 24, 1900 (which was the day fixed in the contract for beginning work), the United States had the right to, and that it did immediately, on the next day, annul the contract; and that upon such annulment, the United States were entitled to recover the excess cost of completion at a higher price through another contractor.

To which we respond that such a decision entirely disregards the distinction between (1) the earlier provision in the contract (called Clause A), which provides that upon annulment for failure to begin on time, or to faithfully prosecute the work, the only result was that the contractor should *forfeit* the money or reserved percentage due, and (2) the provision in the latter part of the contract (called Clause B) which provides that in the event of a failure to complete the contract on time, the United States should be entitled to not only retain the moneys in hand, but *also to recover the excess cost of completing the work.*

By such a construction of the contract, thereby disregarding the distinction between the two clauses, the Circuit Court of Appeals failed to follow the decision in *United States* v. *O'Brien,* 220 U. S. 321, directly construing that very clause in the Standard United States Government Engineering Contract Form 19.

United States v. *O'Brien,* 220 U. S. 231, is a controlling authority in the case at bar.

Second: They hold that the 50 days' extension of time granted to the contractor for beginning work, did not release the surety, because the original contract contemplated that an extension of time might be granted on account of freshets, ice or other force or violence of the elements, preventing the contractor from beginning on time.

To which we respond that the extension was not granted under the contract provision referred to, as the contractor was not delayed by freshets, ice, etc.; but the extension was granted simply because the contractor failed to build its plant, but proposed, if the extension were granted, to more than compensate for the delay by installing a larger plant than the contract required.

Third: They hold that the excess cost of completing the work under a new contract, is the proper measure of damage.

To which we respond that the new contract was upon different and more onerous terms than the original contract, which terms caused an increased cost; and for that reason the increased cost is not a proper measure of damage.

UNITED STATES v. STONE, SAND & GRAVEL CO. *et al.*

177 F. R. 321.

(Circuit Court of Appeals, Fifth Circuit. March 29, 1910.)

No. 1,893.

1. UNITED STATES (§ 67*)—PUBLIC IMPROVEMENTS—CONTRACTORS—BOND—ACTION.

A petition, alleging the advertising for bids for the improvement of certain public waterways, the execution of a contract on the bid of the S. Company for the performance of the work, the execution of a bond by defendant surety company to secure performance, the S. Company's failure to commence the work within the time prescribed, the granting of additional time by the government, its refusal to grant a second extension, the S. Company's failure to commence work within the time as extended, the cancellation of the contract, and the performance of the work under a subsequent contract with another at a higher price, stated a cause of action both against the S. Company and the surety.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

2. UNITED STATES (§ 67*)—PUBLIC WORK—CONTRACT—ANNULMENT.

Where, after a contractor with the United States for a public waterways improvement failed to begin the work within the time fixed as extended, the government canceled a contract and entered into a subsequent similar contract with another contractor at a higher price, who completed the work at a higher cost, the cancellation of the original contract did not release the contractor or his surety from liability for the loss sustained.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

3. UNITED STATES (§ 67*)—PUBLIC IMPROVEMENTS—CONTRACT—CANCELLATION—DAMAGES.

Where, after the termination of a contract for public improvement by the United States for contractor's failure to commence work within the time fixed as extended, the government entered into another contract with another to complete the work at a higher cost, and such contracts were substantially similar, the second contract was competent evidence of damages for the default of the original contractor and his surety.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Action by the United States against the Stone, Sand & Gravel Company and others. Judgment for defendants, and plaintiff brings error. Reversed, with directions.

COMMENT.

The continuity of our brief would be too much interrupted if, in connection with each subject discussed, we should state the reasoning of the Circuit Court of Appeals and point out its errors; and yet to prevent any impression that we concede the correctness of its argument by our failure to correct it, we herewith print its entire opinions, and in parallel columns indicate briefly the principal points of our criticism.

OPINION.

Charlton R. Beattie, U. S. Atty., and *W. J. Waguespack*, Asst. U. S. Atty. (*Chapman W. Maupin*, of counsel), for the United States.

Thomas W. Bullitt (*Howe, Fenner, Spencer & Cocke*, of counsel), for defendant in error American Surety Co.

T. M. & J. D. Miller, for defendant in error Stone, Sand & Gravel Co.

Before PARDEE, MCCORMICK, and SHELBY, Circuit Judges.

MCCORMICK, Circuit Judge. In March, 1899, and for some time previous to that date, the government of the United States was engaged in the work of restoring the harbor at Vicksburg, Miss., and caused the following notice to be duly published:

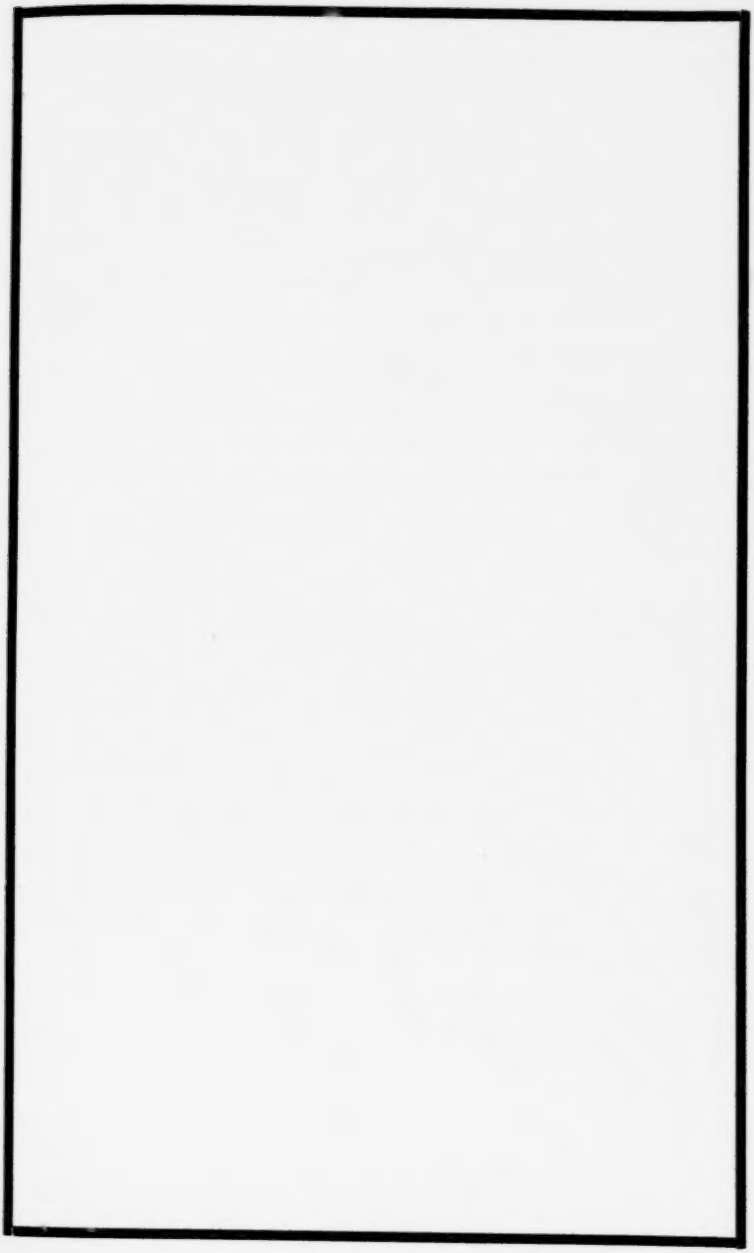
> "U. S. Engineer Office, Vicksburg, Miss., March 2, 1899.
>
> "Sealed proposals for excavating 7,500,000 cubic yards of earth, more or less, along route for diverting mouth of Yazoo river, near Vicksburg, Miss., under continuous contract, will be received here until 3 o'clock p. m., April 5, 1899. Information furnished on application.
>
> J. H. Willard, Maj. Engrs."

Ample written specifications were prepared, copies of which were furnished applicants. The object of the work was to give a new mouth or outlet for the various streams forming the Yazoo System of the Mississippi river, which shall be navigable at all seasons of the year, and at the same time to restore the harbor at Vicksburg, Miss. These specifications showed that the project authorized by Congress contemplates excavating about 7,500,000 cubic yards of earth, more or less, along the route selected from the junction of Yazoo river proper with a former bend of Mississippi river (A. D. 1797-1808), about 9.8 miles above present entrance of the Yazoo into the Mississippi, and following the "wrong end of Old river," cutting through a neck of low land from Old river to Lake Centennial, thence across Lake Centennial around the head of De Soto Island, and down the former channel of Mississippi river (1876) in front of the city of Vicksburg to deep water in the bend of Mississippi river at Kleinston Landing. The length of the proposed route is as follows: (Giving detail of total mileage aggregating 9.31 miles).

For this work, the defendant the Stone, Sand & Gravel Company (which we will call the "contractor company") submitted its bid, as follows:

> "New Orleans, La., April 3, 1899.
>
> "To Major J. H. Willard, Corps of Engineers, U. S. Army, Vicksburg, Miss.—Sir: In accordance with your advertisement

COMMENT.



and specifications of March 2, 1899, inviting proposals for diverting mouth of Yazoo river, Miss., and subject to all the conditions and requirements thereof, copies of both of which are hereto attached, and, so far as they relate to this proposal, are made a part of it, we (or I) propose to furnish the necessary plant and to excavate 7,500,000 cubic yards of earth, more or less, along the route selected and to deposit the material so excavated at places approved by the engineer officer in charge at eight and forty-nine one hundred cents (8.49 cts.) per cubic yard, measured in place; to begin active operations within six months after notice of award of contract, with sufficient force and plant for an output of not less than 200,000 cubic yards per month, which shall be increased within six months from date of beginning to give an output of not less than three hundred and thirty thousand cubic yards of excavation per month, unless the work is interfered with or stopped by floods, storms, epidemics, or other causes beyond control."

Accompanying this proposal there was filed a guaranty obligation signed by the contractor company and by the American Surety Company (which we will call the "surety") in these words:

"We, Stone, Sand & Gravel Company of New Orleans, in the county of Orleans and state of Louisiana, and American Surety Company, of New York, in the county of Kings, and state of New York, hereby undertake that if the bid of Stone, Sand & Gravel Company herewith accompanying, dated April 3, 1899, for excavation for diverting mouth of Yazoo river, Miss., be accepted within sixty days from the date of the opening of proposals therefor, the said bidder, Stone, Sand & Gravel Company, will, within ten (10) days after notice of such acceptance, enter into a contract with the proper officer of the United States to do the work required, at the prices offered by said bid and in accordance with the terms and conditions of the advertisement and specifications inviting said proposals, and will give bond with good and sufficient sureties for the faithful and proper fulfillment of such contract. And we bind ourselves, our heirs, executors and administrators, jointly and severally, to pay the United States, in case the said bidder shall fail to enter into such contract or give such bond within ten (10) days after said notice of acceptance, the difference in money between the amount of the bid of said bidder on the articles or services so accepted and the amount for which the proper officer of the United States may contract with another party to furnish said articles and services, if the latter be in excess of the former."

The bid of the contractor company was accepted, and the contract between it and the government was entered into on the 14th of June, 1899, in which there were, among others, these provisions:

"That the contractor company shall commence active operation under this contract on or before the 5th day of December, 1899, with sufficient force and plant for an output each calendar month of not less than two hundred and sixty thousand (260,000) cubic yards per month, which shall be increased on or before the 5th day of June, 1900, with sufficient force and plant for an output each calendar month of not less than three hundred and thirty thousand (330,000) cubic yards per month; provided,

COMMENT.

The proposal, information and preliminary bond may be ignored under *Gilbert* v. *United States*, 8 Wall. 358, and *Parish* v. *United States*, 8 Wall. 489, holding that the written agreement is the measure of the rights and liabilities of the parties, irrespective of the authorizing Act of Congress, of the preliminary negotiations, etc.

however, that if work shall commence before the date first above written in this paragraph the plant first put in operation shall have an assured capacity of not less than sixty-five thousand (65,000) cubic yards each calendar month, until December 5, 1899, and work shall not begin with less output. * * * That if, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case, the party of the first part, or his successor, legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part (the contractor company); and, upon the giving of such notice, all money or reserve percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States: Provided, however, that if the party (or parties) of the second part shall by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract, such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon. * * * It is further understood and agreed that in case of failure on the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same."

The defendants gave their bond in the sum of $75,000, conditioned that:

"If the above bounden Stone, Sand & Gravel Company shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions and agreements in and by the said contract agreed and covenanted by said Stone, Sand & Gravel Company, to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original

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term of the same, and shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue."

It is averred in the petition that, after the execution of the contract, the contractor company did apply to the government for an extension of time; that this extension was asked for on account of the inability of the company, without fault of its own and for causes contemplated by the contract, to commence the work within the time provided in said contract; and that the time was extended to January 24, 1900.

Upon the failure of the contractor company to prosecute the work within the term of the extension granted, the Chief of Engineers of the United States army did, on the 25th day of January, 1900, recommend that the contract be annulled and the work readvertised and relet. This recommendation was approved by the Secretary of War, and the contract was annulled, and notice was given to the contractor company and to the surety. After advertisement, and in accordance with law, the government contracted with the Atlantic, Gulf & Pacific Company, of New York, for the purpose of prosecuting and completing the work, under which contract (hereinafter called the "new contract") the work was prosecuted and completed at a cost to the United States of $228,201.91 in excess of the amount that the same work would have cost under the contract with the Stone, Sand & Gravel Company (which we will hereinafter call the "original contract").

To recover this amount this suit is brought, with prayer for judgment against both the defendants *in solido* in the sum of $75,000, and against the Stone, Sand & Gravel Company and its receivers in the further sum of $153,201.91.

The defendants answered, in substance, that, by the annulment of the contract, it. in respect to all rights and obligations of either and both parties thereto, became extinguished, and all liability on their part thereon ceased; and the surety specially pleaded that the extension of time granted to its codefendant was granted without the surety's knowledge, consent, or approval; that the terms and conditions of the new contract differed from those contained in the original contract, by which changes in terms and conditions the United States abandoned the original contract, and the surety was thereby released from obligation on its bond; and, further, that the new contract, so

COMMENT.

changed, forms no basis for measuring damages for the breach of the original contract. The surety's answer closes with the averment that the terms of the new contract had a tendency to cause bidders for the work under it to ask a higher price upon the work to be done than would have been asked if the work had been let under the terms of the original contract; and the new contract forms no proper measure by which to estimate or calculate damages for the nonperformance of the original contract.

The action was tried in the Circuit Court before a jury. The record shows that, at the conclusion of the hearing of the evidence, the United States attorney moved the court to direct a verdict in favor of the government; and the counsel for the defendants moved the court to direct a verdict in favor of the defendants. After hearing the argument of the counsel on these motions, the court refused the motion of the United States attorney, and granted the motion of the counsel for the defendants; and, on the verdict so returned, gave judgment for both defendants.

The plaintiff assigns that the court erred: (1) In refusing to grant her motion; and (2) in directing a verdict against her.

The defendants contend: (1) That the petition does not state a cause of action against either of them; (2) that the annulment of the original contract released both of the defendants; (3) that the extension of time was such an alteration in the terms of the contract that the surety was released; and that the new contract differs so materially from the original contract that it forms no proper measure of damages for the default of the original contractor, and in effect operates a discharge of the original contract.

The first point is obviously not well taken. The others we group, and address to them some observations on the dealings between the parties.

The first step in the negotiations between the plaintiff and the defendants was the advertisement from the engineer's office for sealed proposals for excavating along the proposed route under continuous contract. Information furnished on application. That information showed the object of the work, the extent of it, and full particulars touching it. There is no question that the information was fully given and explained to the contractor company before it made its proposal for doing the work The proposal was made in accordance with the advertisement and with the specifications, copies of both of which were attached to the proposal. The guaranty bond required, and given,

COMMENT.

The proposal, information and preliminary bond may be ignored under *Gilbert* v. *United States,* 8 Wall. 358, and *Parish* v. *United States*, 8 Wall. 489, holding that the written agreement is the measure of the rights and liabilities of the parties, irrespective of the authorizing Act of Congress, of the preliminary negotiations, etc.

bound both of the defendants to pay to the United States, "in case the bidder failed to enter into such a contract as is proposed and give the required bond, the difference in money between the amount of its bid and the amount for which the United States may contract with another party to furnish the articles and service, if the latter amount be in excess of the former."

In satisfaction of this guaranty obligation, the contract was entered into by the Stone, Sand & Gravel Company, and the bond required was given by it and the surety. This constituted the continuous contract under which the service was to be performed.

The contract shows that the parties contemplated that the contracting company might, by causes beyond its control and by no fault of it, be prevented from commencing or completing the work at the time agreed upon, and provided that such additional time might be allowed it for the commencement or completion thereof as, in the judgment of the named officer of the government or of his successor, should be just and reasonable.

Under this provision, which expressed in advance the consent of the surety, the first extension applied for was so far granted as to fix the time for beginning active operations under the contract at January 24, 1900.

An application for a further extension was refused. The contract was duly annulled for failure to commence active operations under it within the time specified.

Some preliminary experimental work had been done to the value, at the contract prices, of $6,206.69, which the defendants claim became forfeited to the plaintiff and extinguished all liability on the part of the defendants.

COMMENT.

This is correct.

This is correct.

This is wholly incorrect as the extension was not applied for on account of "causes beyond its control and by no fault of it". Althought the contract only authorized an extension of time on account of "freshets, ice or other force or violence of the elements, and by no fault of his or their own", the extension was granted simply because the contractor, not realizing the magnitude of the undertaking, had failed to get its plant assembled. (R. 64, 97, 174-178.)

This is correct.

It was incorrect (although doubtless immaterial) for the court to term the 73,106 cubic yards excavated under the permissive clause for the contract price of $6,206.69 as "some preliminary experimental work". The whole

This effort to split the contract into sections of liability, and wrest the meaning of the words "annul" and "forfeiture" from the signification which the whole dealings of the parties show should be given to them, does violence to the plain intent of the parties.

The work was important in its magnitude and in the benefit it promised; it was of public interest that it should be done within a reasonable time, and be of efficient and lasting quality.

It was in contemplation of the parties that the contractor might be unable to perform the work in the manner and in the time specified; and to prevent its being obstructed and delayed by the inability of the contractor to proceed arising out of causes within the control of an efficient contractor, provision for clearing the way of the government to do this work by such other means as it might be able to employ was made; and the word

COMMENT.

73,106 yds. was the very work contracted to be done, and it was experimental only in that it cost $20,996.41 to do it, which

> "of course exceeds the contract price due to the fact that the *first part* of the work was *more or less* of an experimental character, the benefit of which will now be derived by the Government or by future contractors" because previously there was no "such knowledge of the materials to be excavated as to indicate the kind of plant required to do work most expeditiously and economically and * * * no detailed and accurate information could be obtained that would clearly indicate the method and kind of machinery to be employed short of the actual excavations of the various kinds of materials that occur" (R. 134, 145, 174).

The Company spent over $100,000 in installing its plant at Vicksburg to do this work (R. 145, 150, 177).

Defendant's only splitting of the contract into sections of liability was to point out that the parties themselves provided in one section (Clause A) to define the liability in the event of annulment for failure to begin or failure to prosecute the work faithfully, and in another section (Clause B) to define the liability upon the contractor's voluntary *abandonment* of the work before completion or his failure to *complete* within the contract period. There was no effort to wrest the words "annul" and "forfeiture" from their meaning as construed in *P. W. & B. R. R. Co.* v. *Howard*, 13 How. 307, 340; *U. S.* v. *O'Brien*, 220 U. S. 321, 328; *U. S.* v. *McMullen*, 222 U. S. 460, 471; *Graham* v. *U. S.*, 231 U. S. 474, 477.

This is correct.

This is correct; but the Court omitted to add the important qualification that in the event of the contractor's inability to begin or to complete the work on time, the *only ground* allowable for an extension was "*freshets, ice, etc.*"

"annul," used in reference to that situation, should not be given a technical or narrow meaning, or be allowed to embarrass the administration of justice in dealing with conditions which call for only the application of the plainest common sense.

Likewise, in reference to the word "forfeiture," we see nothing here to justify us in construing the provision in which that word is used to mean liquidated damages. To the contrary, it seems clear to us that in contemplation of the parties it signified a penalty to be looked to for the satisfaction *pro tanto* of such damage as might actually be incurred.

With reference to the new contract, no recovery is sought on it in this action. And it is not apparent to us how the so-called "substitutions" complained of can or could in any case affect the rights or liabilities of the defendants under the original contract.

We have read and compared the two contracts in question with studious care, and conclude that the defense attempted to be built on any variance in their wording is highly artificial and without substance. The new contract says:

> "No prior inspection, payment, or act, is to be construed as a waiver of the right of the government to reject any defective work or material or to require the fulfillment of any of the terms of the contract."

COMMENT.

The Court errs. In *U. S.* v. *O'Brien*, 220 U. S. 321, 328, it was held that this precise provision in Clause A that "all money or reserve percentage * * * shall be and become forfeited to the United States", was valid. It *was* upheld as liquidated damages. It was held *not* to be "a penalty to be looked to for the satisfaction *pro tanto* of such damage as might actually be incurred".

This is misleading as the Court omitted the first part of the sentence; the entire sentence is as follows (R. 123, 124):

> "It is further agreed by and between the parties hereto that *until final inspection and acceptance of, and payment for,* all of the material and work herein provided for, *no prior inspection,* payment, or act is to be construed as a waiver of the right of the party of the first part *to reject* any defective work or material or to require the fulfillment of any of the terms of the contract."

The purpose and effect of this new clause can only be understood by first referring to the following clause which is contained in both the old and new contracts, to wit (R., 63, 121):

> All materials furnished and work done under this contract shall, *before being accepted,* be subject to a *rigid inspection* by an inspector appointed on the part of the government, and such as do not conform to the specifications set forth in this contract shall be *rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.*

The purpose of the new clause was that while under the old clause above quoted, the engineer officer's decision month by month was conclusive and final as against both the Government and the contractor, yet by the new clause such decision should remain open to impeachment or

The specifications are a part of each of these contracts, and, speaking of the work and material, specification 31, attached as a part of the new contract, provides:

> "The decision of the engineer officer in charge as to quality and quantity shall be final."

This is identical in word and letter with specification 32 attached to the original contract;

and we cannot find in the original contract any words to express or fairly imply that the final decision of the engineer officer during the progress of the work shall be construed as a waiver of the right of the government to reject any defective work or material whenever discovered; and, in the absence of any express language requiring it to be so construed, the courts would construe it not necessarily as the defendants do, but according to the conditions of each particular case.

COMMENT.

revision by the *United States alone*, until the final payment and completion of the whole work. In short, by inserting this new clause in the relet contract, the United States reserved to itself the very power of revision which the employer in *Chicago, etc., R. R. Co.* vs. *Price*, 138 U. S. 185, 194, tried to exercise, and which was denied to it by this court, because of the clause making the engineer's decision final. By the new clause in the relet contract, the United States reserved the right to have, at the end of the contract period, a reinvestigation, measurement and inspection of all the work that had gone before, and to require the contractor to do over any part of it which the engineer officer (perhaps a successor one) thought defective; that is to say, the United States by this new clause imposed upon the contractor a guarantee that the work *as a whole*, should accomplish the purpose intended, and thereby obtained the very thing which in *Sheffield Ry. Co.* v. *Gordon*, 151 U. S. 285, 292, this Court said could not be done without a special clause to that effect. For full discussion see our brief, page .

This is also the last sentence in the old clause above quoted, and means that the Engineer's decision is equally conducive against both parties (U. S. and the Contractor).

The Circuit Court of Appeals simply overlooked the cases of *Sheffield Ry. Co.* v. *Gordon*, 151 U. S. 285, 292, *Chicago, etc., Ry. Co.* v. *Price*, 138 U. S. 185, 194, *Martinsburg R. R. Co.* v. *March*, 144 U. S. 549, 551, 552, and *United States* v. *Gleason*, 175 U. S. 588, 605, which expressly hold that where there is a provision in a contract to the effect that "the decision of the engineer officer in charge as to quality and quantity shall be final", it means what it says and *does* prevent the Government from rejecting defective work or material subsequently discovered (see our Brief, pp.).

The defendants' second specification in this connection is that the two contracts contain essentially different provisions respecting the effect of the annulment of the contract by the United States in case of default by the contractor.

This is based on the defendants' construction of the provisions respecting the effect of the annulment of the contract as used in the original contract, which construction of the defendants we have attempted to show in the foregoing portions of this opinion is not sound, and that our construction of it makes it mean substantially what the provision in the new contract only more clearly expresses.

The defendants complain that the new contract contains a clause which is not in the original contract, to the effect that the contractor shall hold the government harmless against demands of any nature on account of the use of any patent, invention, article, or process included in the materials agreed to be furnished and the work to be done under the contract.

In the original contract we find it expressly stated that the contractor shall be responsible for, and pay, all liabilities incurred in the prosecution of the work for labor and material. He had to furnish all labor and material. Any liability that he incurred therefor he was bound to meet, and, in law and substance, was as much bound for these charges under the original contract as is the contractor under the new contract.

COMMENT.

The two contracts certainly do contain essentially different provisions; Clause A in the old contract provided *only* for a forfeiture of retained pay; while Clause A in the new contract expressly provided for the *excess cost* of completion. There is between the two contracts as to annulment, exactly the difference which in *United States* v. *O'Brien,* 220 U. S. 321, was pointed out to exist between the earlier Clause A and the later Clause B in the *O'Brien* contract.

The defendant's construction of the provision (Clause A), representing the effect of the annulment, was that which was upheld in *U. S.* v. *O'Brien*, 220 U. S. 321; namely, that upon the annulment *only* the retained pay was forfeited, and that the contractor was *not liable* for the excess cost of completion. The Circuit Court of Appeals' "attempt" fails in the light of *U. S.* v. *O'Brien.* The Circuit Court of Appeals' construction that Clause A in in the old contract means substantially what the new contract only more clearly expresses, is, of course, erroneous; because, as held in the *O'Brien* case, a provision for a forfeiture of retained pay on annulment, *is not at all the same thing* as an express provision on failure to complete for the recovery of the excess cost of completion.

This provision in the original contract obviously relates to the ordinary mechanics and materialmen's claims. Even if it imports a promise by the contractor to pay liabilities *he* would be under for an unauthorized use of a patented invention, still it was not an obligation by the contractor to protect the *United States* against liability for contributory infringement. The *contractor's* obligation to "pay all liabilities incurred in the prosecution of the work for labor and material", only referred to *his own* obligations and in no sense referred to any

The provision as to the time of beginning work and the limit of time within which the work shall be completed is substantially the same in each contract. Wherein the new contract differs, the difference is in favor of the contractor.

We conclude that both of the assignments of error are well taken. All of the work done under the new contract was embraced under the original contract; it was done under substan-

COMMENT.

liability that the United States would be under by reason of an unauthorized invention having been used to improve Government property (*Elizabeth* v. *Pavement Co.*, 97 U. S. 126; see Brief, pp.).

The time limit within which the work should be completed was *not* substantially the same. The old contract fixed *no time limit* for completion. It did not require the contractor to work at any given rate. It required him *to have a plant* of a certain capacity, but there was no obligation upon him to operate the plant at such capacity. The only regulation of the time of completion was such as might be derived from the right of the United States to annul the contract if the contractor failed to prosecute the work faithfully and diligently.

On the other hand, the new contract fixed an *absolute time limit* of 30 months, with the provision that if it were not completed on that very day, the contractor should be liable for the entire excess cost of completion.

The Court, therefore, erred in saying that the difference in the new contract was *in favor* of the contractor; for it is obvious that fixing a definite time limit for completion (which, by the way would require work at the average rate of 250,000 yds. per month every month for 30 months) is much more onerous than the old contract, which only required a capacity of 260,000 yds. for the first 6 months and 300,000 yds. thereafter, but with no obligation whatever to work at full capacity nor to finish the work at any given time. (See our Brief, pp. .)

The work was *not* done under substantially the same specifications and stipulations.

The new contract imposed the following more onerous requirements, which all tended to increase the cost thereunder:

1. Indemnity against patented inventions, etc.

2. Time of completion limited to 30 months.

tially the same specifications and stipulations, and it was shown to have cost the precise amount claimed in the petition. We think there is no substantial defense pleaded to the action, and on the trial there was no offer of proof tending to question the damage to the plaintiff in the amount claimed, and that amount was fully proved by competent evidence and the admission of the defendants.

To support their contentions, counsel for defendants have cited *O'Connor* v. *Henderson Bridge Co.*, 95 Ky. 633; *Henderson Bridge Co.* v. *O'Connor*, 88 Ky. 303; *Sparhawk* v. *United States*, 134 Fed. 720; *Quinn* v. *United States*, 99 U. S. 30; *Philadelphia, Wilmington & Baltimore Railroad Co.* v. *Howard*, 13 How. 329; *Farrelly* v. *United States*, 159 Fed. 671.

In the Bridge Company Case, the annulment attempted to be made was held to have been wrongful and invalid, and the decision has no application here.

COMMENT.

3. Imposed added cost of all inspection and superintendence if the work was not completed exactly on time.

4. Instead of making the engineer's decision final month by month as to qulity and quantity of work done, the United States, while making it final as *against* the contractor, reserved the right to revise and redetermine for itself at the completion of the entire work, the correctness of prior estimates.

5. In case of annulment for slothfulness or failure to begin on time, the contractor should be liable for the excess cost of completion. The United States thereby accomplishing what it failed to accomplish in *U. S.* v. *O'Brien*, 220 U. S. 321 (see our brief, p.).

The United States proved and the defendants admitted that the United States had paid the $228,201.91 in excess of the contract price to complete the work; and while the defendant did not question the *amount* the United States had to pay to complete the work, they did insist that the amount so proven *was not a proper measure of damages.*

The defendants offered no proof questioning the damages to plaintiff, as the proper measure of damage is purely a legal question on which it is not necessary to offer our proof. If the United States' theory as to the measure of damages is correct, then the figures are unquestioned—the whole controversy turns on *what* is the proper legal measure of damages.

U. S. v. *O'Brien*, 220 U. S. 321; *U. S.* v. *McMullen*, 222 U. S. 460, 471, and *Graham* v. *U. S.*, 231 U. S. 474, 477, have settled conclusively the effect of an annulment.

In Sparhawk Case and the Quinn Case, it seems to us that the decision supports the right of the plaintiff in the case before us.

In our opinion, *Railroad Co.* v. *Howard* supports what we have advanced on the subject of forfeiture.

The case of *Farrelly* v. *United States*, 159 Fed. 671, 86 C. C. A. 539, appears, on a hasty reading, to support the contentions of the defendants; but the very eminent judge who wrote the opinion of the court in that case distinguished it from the case of *United States* v. *Maloney*, 4 App. Cas. (D. C.) 505, in a way that puts the case we have in the class with the Maloney Case. He says:

> "In the Maloney Case the contractor wholly failed to do any work whatever. He wholly failed to commence work on or before the 16th day of June, 1891, which he had expressly agreed to do. There was a complete breach of the contract before action was taken under the annulment clause."

Precisely this case as we have resolved it.

It follows that the judgment must be reversed, and the case remanded to the Circuit Court, with direction to have judgment

COMMENT.

Sparhawk v. *United States*, 134 F. R. 720, is really not in point as there was no contract provision as to the results that should follow upon annulment. The contract simply gave the United States the power to annul for any default, and when the contractor failed to furnish supplies that were ordered, the Government annulled the contract and was allowed to recover the excess cost of purchasing the supplies ordered; but was not allowed recovery for supplies purchased after the annulment (see Brief, p.).

In *Quinn* v. *U. S.*, 99 U. S. 30, the contractor, although still at work, failed to complete the work within the contract period; whereupon the United States, under a contract provision to that effect, took over the contract and completed the work at less than the contract price. The case turned upon the peculiar language of the contract, the Court holding that the retained percentage was neither a penalty nor liquidated damages, but a mere indemnity against expense (see brief, p.).

Railroad Co. v. *Howard*, 13 How. 329, relates to the effect of an annulment which is fully covered in *U. S.* v. *O'Brien*, 220 U. S. 321.

The *Farrelly* case was affirmed under the style of *U. S.* v. *O'Brien*, 220 U. S. 321. There is no conflict between it and the *Maloney* case (see Brief, p.). The annulment in the *Maloney* case was not (as here) for a failure to begin work on a particular day, but because the contractor absolutely refused to do work at any time, although repeatedly urged to do it. It was a case of absolute *abandonment* and refusal to do anything—a complete anticipatory breach. Hence the action of the United States was taken not under Clause A, but Clause B, and therefore, entirely different results necessarily followed in the *Maloney* case from the results which flowed in the *O'Brien* and *Stone, Sand & Gravel Co.* cases.

entered for the plaintiff against the Stone, Sand & Gravel Company and its receivers as such, and the American Surety Company, *in solido*, in the sum of $75,000, with legal interest from judicial demand, and against the Stone, Sand & Gravel Company and its receivers as such in the further sum of $140,095.22, with legal interest from judicial demand, being amount due the plaintiff after allowing the Stone, Sand & Gravel Company a credit of $60,200.00 for excavation done by it.

And it is so ordered.

STONE, SAND & GRAVEL CO. *et al.* v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 10, 1912.)

195 F. R. 68.

No. 2,271.

APPEAL AND ERROR (§ 1097*) — LAW OF CASE.

A former decision on appeal or error is the law of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Action by the United States against the Stone, Sand & Gravel Company and another. Judgment for plaintiff and defendants bring error. Affirmed.

Geo. Denegre, J. P. Blair, Victor Leovy, and *T. M. Miller*, for plaintiffs in error.

Charlton R. Beattie, U. S. Atty. (*Louis H. Burns*, Asst. U. S. Atty., on the brief), for the United States.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. The present is the second writ of error in this case. When it was first here, the judgment was reversed and the cause remanded, with directions to enter judgment in favor of the government. *United States* v. *Stone, Sand & Gravel Co.*, 177 Fed. 321. In obedience to the requirements of the mandate, judgment was duly rendered, and the court is now requested to review its former ruling and to again remand the cause. "It is," said the Supreme Court, in *Thompson* v. *Maxwell Land Grant Company*, 168 U. S. 456, "the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The first decision

COMMENT.

has become the settled law of the case. *Supervisors* v. *Kennicott*, 94 U. S. 498, and cases cited in the opinion; *Clark* v. *Keith*, 106 U. S. 464; *Chaffin* v. *Taylor*, 116 U. S. 567; *Northern Pacific Railroad* v. *Ellis*, 144 U. S. 458; *Great Western Telegraph Company* v. *Burnham*, 162 U. S. 339, 343."

It is, however, insisted by counsel for the plaintiffs in error that the ruling on the first writ of error, in construing the contract between the parties, is in direct conflict with *United States* v. *O'Brien*, 220 U. S. 321, recently decided by the Supreme Court.

Analysis of the *O'Brien* Case will disclose that it is clearly distinguishable from the case at bar. In that case there was no breach of contract, and it was held, under the facts appearing of record, that the government could not declare a breach, so as to hold the contractors liable in damages for failure to perform. The following clause of the syllabus correctly reflects the ruling of the court:

> "Where, except for the prohibition of the United States to allow the contractor to proceed, the work might have been finished within the specified period, the United States cannot claim a breach entitling it to annul the contract and hold the contractor responsible for the difference in cost of completion."

In the present case there was an utter failure on the part of the contractor to perform his contractual obligations, and the government, on that account, was compelled to relet the contract to other parties. Bearing in mind this distinction we are of the opinion that the ruling, made by this court upon the first writ of error, is not in conflict with the views expressed by the Supreme Court in the O'Brien Case.

The judgment of the trial court should be affirmed, and it is so ordered.

COMMENT.

The Court failed to correctly analyze the *O'Brien* case. The Supreme Court held that *O'Brien* was not liable for the excess cost of completion for two independent reasons, to wit:

1. Clause A (annulment clause) only provided for the forfeiture of retained pay; and did *not* provide for the recovery of the excess cost of completion.

2. There could be no recovery under Clause B (which *did* provide for the excess cost of completion) because there was no *breach* of Clause B, as a failure to complete because turned off by annulment was not a failure to complete by July 1, 1902.

This is not correct. The contractor did not abandon nor refuse to perform. He did fail to begin on the precise day and the United States elected to annul the contract under Clause A. But that is a very different thing from being "*compelled* to relet the contract" on account of the contractor's utter failure to perform.

FARRELLY v. UNITED STATES.

O'BRIEN v. *SAME*.

159 F. R. 671

(Circuit Court of Appeals, Second Circuit. January 7, 1908.)

Nos. 92, 93.

1. CONTRACTS—CONSTRUCTION—DAMAGES FOR BREACH.

A contract between the United States and defendants for dredging work to be completed by a time stated provided that if defendants should fail to prosecute the work faithfully and diligently the engineer officer in charge should have power, with the sanction of the Chief of Engineers, to annul the contract by written notice, and that "upon the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States, and the party of the first part shall be authorized, if an immediate performance of the work * * * be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract as prescribed in section 3709 of the Revised Statutes of the United States." Such section (U. S. Comp. St. 1901, p. 2484) requires contracts to be let after advertisement, except that, when public exigency requires, open contracts may be made without advertisement. By a subsequent clause it was provided that, in case of a failure "to complete the contract as specified and agreed upon," all sums due and percentages retained should be forfeited, and the United States should be entitled to recover all damages in excess of such forfeiture due to such failure, including the excess cost of completion. *Held*, that the provision of the latter clause for a recovery of the excess cost of completion did not apply in case of an annulment of the contract under the prior provision before the time fixed for completion had expired, but that in such case no damages were recoverable in excess of the amount due and unpaid and the reserved percentage, expressly provided for.

2. SAME—WAIVER OF BREACH.

The fact that prior to the time of the annulment of such contract the United States had failed to make monthly payments on the work as required by the contract could not be availed of by defendants as a defense against the consequences of such annulment, where they did not elect to treat such defaults as a breach, but continued the work.

3. SAME—RIGHT OF CANCELLATION—SUFFICIENCY OF NOTICE.

Notice having been given to defendants by the engineer officer in charge on the 4th of a month that unless an increased plant was put on the work by the 1st of the succeeding month the contract would be annulled, a notice of annulment, mailed on the 31st and received by defendants on the date specified, was not premature, where no increased plant was then put, or sought to be put, on the work; nor was it necessary that the approval of the annulment by the Chief of Engineers should be in writing, there being no such requirement in the contract.

Ward, Circuit Judge, dissenting in part.

In Error to the Circuit Court of the United States for the Southern District of New York.

This action was brought by the United States against O'Brien, successor of Perkins & O'Brien, contractors, and the City Trust Company, surety, under a contract for dredging Narragansett Bay and Providence river. Recovery was had for amounts earned, but not paid, and for what the work actually cost the government after O'Brien was put off it, as against O'Brien $73,578.70 and as against the company $67,[illegible]45. Each defendant sued out a writ of error.

E. J. Swift and *George A. King*, for plaintiff in error Farrelly.

J. H. Broome, for plaintiff in error O'Brien.

Henry L. Stimson, U. S. Atty., and *Winfred T. Denison*, *Felix Frankfurter*, and *Francis B. Biru*, Asst. U. S. Attys.

Before LACOMBE, COXE, AND WARD, Circuit Judges.

LACOMBE, Circuit Judge. The contract was entered into November 10, 1896. By it the parties of the second part agreed to furnish the necessary equipment and do all the work of dredging required in a certain part of Narragansett Bay, in accordance with specifications attached. In consideration of the parties of the second part performing the required work (removing about 2,050,000 cubic yards of material) the party of the first part agreed to pay at the rate of 10.8 cents per cubic yard. All materials and work, before acceptance, were to be subject to a rigid inspection, and the decision of the engineer officer in charge as to quality and quantity was to be final. It was provided that payments should be made monthly when funds are available, 10 per cent. being reserved; also that "the said Perkins & O'Brien shall commence work on or before the 1st day of March, 1896, and shall complete the work on or before the 1st day of July, 1902."

Work was begun on March 1, 1896, and, although at the outset it was apparently pushed sufficiently to satisfy the engineer officer in charge, after several months the rate of progress was such that he repeatedly called upon the contractors to increase their monthly output, and finally, on December 31, 1900, sent a letter to each of the principals, and to the surety, formally notifying them that the work under the contract had not, in his judgment, been prosecuted faithfully and diligently, and that the contract "is hereby annulled." At that time there had been 826,708 cubic yards in all removed, 13,400 in the current month. The engineer supposed there was about 1,500,000 yet to be taken out, but in reality there was only 1,300,000. It was, as the engineer testified, "a very possible thing, easily accomplished, for any one to have completed that contract within 18 months if they had the plant * * * My judgment was that these men could not control sufficient plant to complete what remained to be done * * * in the remaining time." Since the most important question in the case deals with the results of such annulment it will be first considered.

The contract contains the following clause, which is found near the close of the document:

"It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, all sums due and percentage retained shall thereby be forfeited to the United States, and that the said United States shall also have the right to re

cover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same."

Earlier in the contract, and immediately after the clause providing for the beginning and completion of the work, is found the following clause:

"If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed (*i. e.*, the engineer officer in charge), shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and upon the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States, and the party of the first part shall be authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States."

The section of the Revised Statutes referred to [U. S. Comp. St. 1901, p. 2484] provides that all purchases and contracts for supplies or services shall be made by advertising a sufficient time for proposals when the public exigencies do not require immediate delivery or performance, and that when the public exigency requires the same may be obtained by open purchase or contract without advertisement. The notice of annulment of this contract was given under the clause last above quoted.

It will be seen that, in the event of a "failure to complete the contract as specified and agreed upon," all sums due and percentage retained are forfeited, and the United States is also entitled to recover all damages in excess of such forfeiture due to such failure, including the excess cost of completion. Inasmuch as a stated time is given for completion, it would not ordinarily be possible to declare that there had been a failure to complete, until the time given for such completion had elapsed. It might frequently cause great embarrassment to the government if it should be required to wait till the day when the breach was complete, especially when the conduct of the contractor and the manner in which he was prosecuting the work indicated that he would not complete it on the day named. In order, therefore, to provide for such a contingency, the annulment clause was inserted, giving to the engineer officer the right to terminate the contract in advance of the time allowed for its fulfillment, whenever in his judgment the contractor may fail to prosecute the work faithfully and diligently. This clause, while no doubt necessary, is a drastic one. It allows the government to terminate the contract although—as was the case here—the contractor could easily have fully completed the work in the time yet left, had he mended his ways and been allowed to continue. Moreover, while in one sense it may be said that a contractor who fails to prose-

cute the work faithfully and diligently for part of the time allowed him is not doing what the contract impliedly requires him to do, nevertheless, where there is no clause in the contract directing that he shall perform some specified part of the work within some specified time, or even that he shall do some work each month, it can hardly be said that he has broken the contract just because he has been so slothful during the first half of the period allowed him that he will have to be very much more diligent during the remainder of the period, in order to fully complete the work on time. Since this clause is thus drastic, and permits the government to terminate the contract while the contractor is still able to complete, and by such completion avoid a breach of its provisions, it might be expected that the damages to be assessed against him would not be so heavy as those provided for when he has actually failed to complete the contract as specified within the time allowed. Reference to the clause shows that it contains no words calling for damages arising from excess cost of completion. It reads merely:

Upon annulment "all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States."

It is assigned as error that the judgment entered against plaintiffs in error included damages arising from excess cost of completion, and in the opinion of a majority of the court the point is well taken. The general provision in the later clause for forfeiture and damages "in case of failure to complete as specified and agreed upon" does not apply because on January, 1901—a year and a half before the expiration of the time limited—there had not been a "failure to complete," and because the annulment clause does not refer to the later provision, but provides its own punishment for the negligent contractor, viz., exclusion from the work and forfeiture of all sums due him. If the rule for assessing damages were to be found in the general clause, it is difficult to understand why the draftsman dealt with that subject in the annulment clause. Being a form prepared by the party of the first part, and in the preparation of which the contractor took no part, any ambiguities in its language are to be construed against the party preparing it. But we find no ambiguity. The expressed intention is that exclusion and forfeiture of all money due him is the penalty which a negligent contractor must pay when his contract is annulled.

It will not be necessary to review in detail the many authorities cited in support of the judgment. Those in which there was a completed breach of the contract, and those where the contract did not in terms provide for just what should be the consequences in the event of annulment in advance of the time allowed, are not persuasive here. In one of them, U. S. v. Maloney, 4 App. Cas. D. C. 505, the contract was identical with the one at bar. The point here raised is not discussed at any length, the court holding that

"The annulling of the contract under this power reserved to the government certainly does not exonerate either the principal or his sureties from liability for all prior breaches of the contract. Such annulment in no manner affects the obligation under the contract that had accrued prior to that time."

In the Maloney Case the contractor wholly failed to do any work whatever. He wholly failed to "commence work on or before the

16th day of June, 1891," which he had expressly agreed to do. There was a complete breach of the contract before action was taken under the annulment clause.

It is further contended that the reference in the annulment clause to section 3709 of the Revised Statutes "inevitably implies" a right to general damages beyond those stipulated for in such clause. We are unable to concur in this proposition. The reference to section 3709 may be sufficiently accounted for on the theory that the contractor is thus forewarned that in case of annulment he must leave the work at once, because his successor may be selected and sent there without the delay resulting from readvertisement. Moreover, where the context specifically describes the consequences to the contractor, implication must be of the clearest to warrant any addition to the enumeration.

In the views above expressed as to the construction of the contract only a majority of the court concur. It is not disputed that at the time of annulment the government had not paid the monthly estimates for work done in September and October (no work was done in November). Without discussing the question whether or not these failures of the government to carry out the terms of the contract were justified by prior default of the contractors, the point here raised may be disposed of by the statement that the contractors at no time elected to treat any such failure as a breach. They did no even notify the engineer officer that without payment they would be unable to proceed with the work. They chose, as they had a right to do, to continue work after the nonpayments directly up to January 1, 1901, thus continuing the burden as well as the benefit of such further performance, and disregarding the breach so far as it might excuse them from such further performance.

Objection was raised on motion to dismiss, and reserved by exception, that there was no proof of any written sanction of the Chief of Engineers; but the contract nowhere requires that such sanction shall be expressed in writing. Nor do we find that the annulment was premature. Contractors were notified on December 4, 1910, that unless they have on the work by January 1, 1901, a sufficient plant to dredge at least 100,000 cubic yards per month, the contract would be annulled. The final notice of annulment was mailed to them on December 31st, and not received until January 1st. The case is distinguishable from King *v.* U. S., 37 Ct. Cl. 428, in which on the named day the contractor appeared with a suitable force. Here no plant sufficient to dredge at least 100,000 cubic yards a month was put, or sought to be put, on the work on January 1st. There was no evidence introduced or offered tending to show that in exercising his judgment as he did the engineer officer did not act with fairness and good faith.

The judgment is reversed, and cause remanded for a new trial.

WARD, Circuit Judge. I do not concur in the opinion of the court so far as the annulment clause of the contract is concerned. It necessarily implied a covenant on the part of the contractors to prosecute the work "faithfully and diligently," and made the Chief of Engineers the absolute judge of performance. He decided that they had broken

the contract in this respect and therefore annulled it. The United States is accordingly entitled to compensation, which is in this case the excess over the contract price paid to new contractors to whom the work was relet, unless its right to compensation has been contracted away.

The opinion of the court treats the provision that upon annulment "all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be or become forfeited to the United States," as if it were a provision for liquidated damages. I think it a penalty and that the measure of damages is the usual one, viz., compensation which may be more or less than the forfeiture. As a measure, forfeiture would be most unsatisfactory—inadequate if the annulment were declared early in the work and perhaps excessive if declared later. The reference to section 3709, Rev. St. U. S., authorizing the United States to relet the work without advertisement if the public exigencies demand it, strongly confirms this opinion. It is not satisfactorily explained as a warning to the contractors that they may have to leave the work at once if the United States relet without advertisement, because upon the annulment of the contract they would have to leave whatever course the United States pursued in respect to reletting. Unless the contractors were to be liable for the loss, if any, of reletting, I do not see why the statute was referred to. The judgment should be affirmed, with, however, a deduction of the amount of the reserved percentages, $5,409.99, in favor of the principal, John J. O'Brien.

UNITED STATES v. O'BRIEN *et al.* (Circuit Court of Appeals, Second Circuit. May 20, 1908.) No. 269. In Error to the Circuit Court of the United States for the Southern District of New York. Submitted without argument. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The facts are the same as when these cases were here before. Our former opinion was filed January 7, 1908. 159 Fed. 671. Upon the second trial the government amended the complaints by reducing the amount of its claims. This enabled defendants to include among the grounds upon which they moved for direction of verdict in their favor the following: "The government having retained the penalty, which it was authorized to retain, has exercised the sole and exclusive and entire right it had under the terms of the contract." The decision of the trial judge in granting this motion was in accord with the opinion of a majority of this court as indicated in the former opinion. Judgment affirmed.

UNITED STATES *v.* O'BRIEN, INDIVIDUALLY AND AS A MEMBER OF THE FIRM OF PERKINS & O'BRIEN.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 108. Argued March 17, 1911.—Decided April 3, 1911.

The word "annul" as used in the contract involved in this case construed as refusing to perform further, not to rescind or avoid.

A government contract which makes the right of the contractor to continue work under the contract depend upon the approval of the engineer in charge will not in the absence of express terms be construed as making the dissatisfaction of such engineer with progress of the work conclusive of a breach.

Where, except for the prohibition of the United States to allow the contractor to proceed, the work might have been finished within the specified period, the United States cannot claim a breach entitling it to annul the contract and hold the contractor responsible for difference in cost of completion.

163 Fed. Rep. 1022, affirmed.

THE facts are stated in the opinion.

The Solicitor General, with whom *Mr. Assistant Attorney General Denison* was on the brief, for the United States:

Mr. Frederic J. Swift and *Mr. George A. King*, with whom *Mr. William R. Conklin* was on the brief, for defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought by the United States to recover the extra expense incurred to complete some dredging in Rhode Island, by reason of the failure of the defendants Perkins and O'Brien diligently and faithfully to prosecute the work. The complaint was dismissed by the Circuit Court in accordance with the decision of the Circuit Court of Appeals upon a previous trial,

159 Fed. 671; 86 C. C. A. 539 and the judgment was affirmed by the Circuit Court of Appeals 163 Fed. Rep. 1022; 89 C. C. A. 664.

Perkins and O'Brien made a contract with the United States to do the dredging required in improving Providence River and Narragansett Bay between certain points, to begin work on or before March 1, 1899, and to complete it on or before July 1, 1902.

One term of the contract [Clause A] was that if they should fail to begin on time or should,

> "in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect, * * * and, upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in § 3709 of the Revised Statutes of the United States:"

With a proviso that if the contractors should be prevented by violence of the elements from beginning or completing the work as agreed such additional time might be allowed them as in the judgment of the party of the first part should be just.

Toward the end of the contract, four paragraphs further on than the last, was the further agreement [Clause B]:

> "In case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained shall thereby be forfeited to the United States, and that the said United

> States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same."

The work was begun, but did not go on satisfactorily. On December 4, 1900, the major of engineers in charge wrote from Newport to the contractors and their surety, now represented by the other defendant, "that from present appearances it does not seem to be possible for the contractors to put on other dredges than the one now supposed to be at work," stating what had been done and what would have to be done before the time allowed expired, and that to do the work, it would need three dredges upon it continuously. The letter proceeded to give the authorized warning that "unless the contractors have on work by January 1st, 1901, a sufficient plant to dredge at least 100,000 cubic yards per month the contract will be annulled." On December 13 the contractors answered from New York, stating that they expected to make an arrangement to put on two more dredges within a few days. On December 29, 1900, the contractors telegraphed that their representative would call upon the major in charge on Tuesday morning, *i. e.*, January 1. On December 31 he replied that the representative could accomplish nothing by coming, and on the same day wrote to the defendants informing them that the contract was annulled. The work afterwards was finished by other parties, at much increased cost. There was no substantial ground in the evidence to attribute the Government's course to anything but the fault of the contractors, which was very plain, and the only question is what liability they incurred.

The sole material express promise of the contractors was to complete the work by July 1, 1902. If the work was done at that date that promise was performed, no matter how irregularly or with what delays in the earlier months. Under its terms the United States was not concerned with the stages of performance, but only with the completed result. See *Bacon* v. *Parker*, 137 Massachusetts, 309, 311. Its interest in the result, however, made it reasonable to reserve the right to employ someone else if, when time enough had gone by to show what was likely to happen, it saw that it probably would not get what it bargained for from the present hands. But it would be a very severe construction of the contract, a contract, too, framed by the United States, to read the reservation of a right to annul [Clause A], for want of a diligence not otherwise promised, as importing a promise to use such diligence as should satisfy the judgment of the engineer in charge. It is one thing to make the right to continue work under the contract depend upon his approval, another to make his dissatisfaction with progress conclusive of a breach. In this case it was admitted that there was time enough left to finish the work under the contract when the defendants were turned off. It would be a very harsh measure to pronounce the contract broken when but for the prohibition of the United States the defendants might have done the work in time. The right to terminate the employment of the defendants coupled with a provision for monthly payments based upon the amount of material removed, and therefore of course giving little pay for little work, is the protection expressly stipulated by the United States.

Again, the later paragraph that we have quoted [Clause B], giving the right to recover expense of completing the work in excess of the original price, gives that right only "in case of failure * * * to complete this contract as specified and agreed upon." On their face these words mean failure

to complete by July 1, 1902, not failure to complete because turned off by the engineer in charge, a year and six months before that time arrived, when competent persons still might do the job. The earlier clause [Clause A] under which the so-called annulment took place provides for no such consequence, but only for a forfeiture of reserved percentages and money due. It is true that the expression of the right to proceed to provide for the completion of the contract and the reference to Rev. Stat., § 3709, hardly belong in that part of the contract unless the defendants are liable for the expense, but the contract does not show technical accuracy enough to give this consideration great weight. If the United States wants more it must say so in plainer words.

If the proviso for annulment [Clause A] be not construed to import a promise on the defendants' part, we are of opinion that there is no ground to charge them with a breach of contract. There were suggestions on the Government's part of anticipatory breach, etc., that do not seem to us to need discussion.

We may add one further observation, although it hardly is material, in the view that we take. The ill chosen word annul in the contract, repeated in the notice to the contractors and in the complaint, cannot be taken literally in any of them. It means refuse to perform further, not rescind or avoid. *Philadelphia, Wilmington & Baltimore R. R. Co.* v. *Howard*, 13 How. 307, 340. For, if the contract were made naught by the Government's election and notice, all rights under it would be at an end, whereas it provides in terms that rights shall arise upon annulment, which but for this provision in the contract the Government would not have. The suit is upon the contract, but the United States asks more than in our opinion the contract gives.

Judgment affirmed.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 302.

STONE, SAND AND GRAVEL COMPANY AND AMERICAN SURETY COMPANY,
PLAINTIFFS IN ERROR,

vs.

UNITED STATES, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY TO THE GOVERNMENT'S BRIEF.

The Government practically concedes our construction of Clauses A and B, and thus the issues are greatly narrowed.

I.

The Government's Alleged Right to Recover the Excess Cost of Completion upon Common-law Principles, Independently of Clause A.

In order to avoid the controlling effect of *U. S. vs. O'Brien* (220 U. S., 321), the Solicitor General now contends that the annulment was not made under the authority of Clause A, but was the exercise of an inherent right to repudiate a

contract when the adverse party commits a breach going to the essence of the contract.

The Solicitor General argues (1) that the precise *time* of beginning was of the essence of the contract; (2) that the contractor's failure to begin on January 24 was a material breach, going to the essence of the contract; (3) that the Government had an "inherent right" to annul or repudiate the contract for such breach, and that its action was not taken under Clause A, but was a repudiation "on common-law principles, independently of any provision in the contract," and, therefore, (4) that the Government is entitled to recover the actual damages as for a complete breach of the whole contract, and that Clause A did not take away that inherent right.*

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*That we have correctly stated the Solicitor General's argument may be seen from the following quotations from his brief:

> "(1) Time has been expressly made the essence of the agreement" (p. 11).
>
> "(2) Such a breach as the present would have been vital to any construction contract, to say nothing of one involving a public work of the greatest importance and urgency" (p. 11).
>
> "The annulment was for failure to begin work on time which amounted to a breach going to the very essence of the contract" (p. 12).
>
> "(3) The right to annul or repudiate exists *independently* of Clause A" (p. 12).
>
> "That right [of annulment] is *inherent* in every party to a contract independently of any contract provision" (p. 15).
>
> "The annulment did not depend for its validity upon any provision of the contract, but upon the *inherent right* which the law gives every party to a contract to repudiate it upon a breach by the other party going to the essence thereof" (p. 18).
>
> "The so-called annulment was in reality a repudia-

To that we make three independent and conclusive responses:

First. We need not inquire what "inherent right" of annulment the Government *might* have exercised had it chosen so to do; because, in this case, the Government *specifically elected* to proceed, not under any inherent right at common law, *but solely under Clause A*, to wit:

(*a*) Clause A provides for the annulment "with the sanction of the chief of engineers" (R., 64). The "Chief of Engineers" sanctioned it as a necessary condition precedent (R., 3, 97).

(*b*) The contract itself is endorsed (R., 98):

"The within notice of annulment *contemplated by the contract* will be sent," etc.

(*c*) The notice gave the ground of annulment in the language of Clause A, *i. e.*, "fail to prosecute the work" (R., 155). The Solicitor General so concedes (Brief, p. 18).

(*d*) The notice was sent as required by Clause A (R., 155).

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tion of the contract because of a plain breach" (p. 19).

"The so-called annulment of the contract was in reality nothing more than a repudiation of it by the Government on common-law principles *independently* of any provision in the contract" (p. 4).

"(4) Where the right to annul or repudiate exists independently of Clause A, then the measure of damages therein prescribed has no application, and actual damages may be recovered" (p. 12).

(c) The petition declares that "upon the failure to prosecute the work" the contract was annulled "in *accordance* with law *and the provisions of said contract*" (R., 3).

As the Government elected to annul the contract under the clear authority of Clause 5, instead of relying upon an uncertain and disputed right at common law, it cannot now shift its position and say that its action was taken independently of Clause 5. Having annulled *under* Clause 5, the Government's rights must be determined by Clause 5, just as they were in the *O'Brien* case.

The Solicitor General's reference to the annulment as being "merely a ceremony" citing the *McMullen* case, is erroneous, because he forgets that in the *McMullen* case the annulment was *after* the entire contract period had expired, and this court there pointed out that "if the notice had been given *before* the final breach and abandonment it would have meant simply that the United States would proceed no further with the contractor under the contract."

We submit, therefore, that as the Government chose to annul the contract under the power conferred by Clause 5, it is bound by the provisions there made as to the rights and liabilities of the parties to follow such annulment.

As the Government took the *benefit* of Clause 5, so it must take the *burdens*.

It was because of the great doubt as to the right to annul for a mere failure to begin on time, or because of slowness, that the Government inserted Clause 5. It did not want to rely on its "inherent right," and having relied on Clause 5 to help it, so it must abide by Clause 5's provisions as to damages.

Second. The time of beginning work under a construction contract that is to run for several years is not ordinarily of the essence of the contract. (See Original Brief, p. 21).

In *Kennedy Town Co. vs. 1st National Bank* (136 S. W., 558, 564), it is said:

> "The failure of the contractor to begin the construction of the building at the time agreed upon could not justify the owner in refusing to permit him to begin at a later date, unless it should appear that the time fixed for the beginning was of the essence of the contract, and this could be shown only by proving that the building could not be finished at the time agreed upon for its completion unless the work should start at the date agreed upon, and defendant's answer contained no such allegation."

A mere failure to begin work on the precise day would not justify the other party in repudiating the contract. Therefore the Government was not justified on common-law principles in repudiating the contract on January 25 simply because the Stone Sand & Gravel Company had failed to begin work the day before.

It was only by virtue of the express provisions of Clause A that the United States acquired the right to annul the contract for even a single day's delay.

Third. The parties made time of the essence of the contract, but this was done *solely* by Clause A. The Solicitor General's fundamental assumption of the importance of time (a breach of which he argues justified repudiation) is derived wholly from Clause A.

But Clause A not only fixed the *importance* of time, but it also specified exactly what should be the *consequences* of a breach of such time requirement. And the Government is as much limited to those particular consequences (*i. e.*, annulment and forfeiture of retained pay) as it is entitled to rely on Clause A as establishing time to be of the essence of the contract.

The failure to begin on January 24 became a vital breach only because Clause A made it so.

The Solicitor General has not correctly appreciated the grounds of the decisions in the *O'Brien*, *McMullen*, *Graham*, and *Maloney* cases, and he erroneously argues that the case at bar depends on whether the *O'Brien* or *Maloney* case controls.

We disagree with him. (See our Original Brief, pp. 47, 52, 56-61, for an analysis of those cases.)

In the *O'Brien* case the annulment was (as here) while the contractor was still anxious to perform.

On the other hand, in the *McMullen* and *Graham* cases, the annulment was *after* the expiration of the entire contract time for completion, and recovery was allowed under a clause *specifically authorizing a recovery for the excess cost of completion*.

In the *Maloney* case the annulment was *after* the contractor had voluntarily abandoned the contract and absolutely refused to work, and hence Clause B applied, which likewise expressly authorized a recovery of the excess cost of completion.

On the other hand, in the case at bar the contractor did *not* abandon the contract as in the *Graham* and *Maloney* cases; neither had the time for completion expired as in the *McMullen* case; but, on the contrary, the Stone, Sand & Gravel Company was like O'Brien, who had his contract taken away while he was *still willing and trying to perform it.*

Finally, it is not a question of whether Clause A takes away some right the Government would otherwise possess, as the Solicitor General contends, but whether the Government after claiming *under* Clause A in order to annul the contract can then claim *adversely* to it in order to recover more than Clause A permits.

11.

The Release of the Surety by the Extension of Time.

1. The clause from the specifications quoted by the Solicitor General (Brief, p. 21) relates only to extending "the time for *completion*," and hence is not a consent in advance of extending "the time for *beginning*."

2. The Solicitor General errs (Brief, pp. 24-25) in the suggestion that the surety wrote the bond and hence should have made it plainer. The United States wrote the bond on its own "Form J" which is its regular form and any ambiguities should be decided against the United States.

3. The Solicitor General (Brief, p. 25) cites a clause that relates only to extensions for *completion* as justifying an extension for *beginning*. That vitiates his entire argument.

4. Finally, the Solicitor General says that the extension for beginning work did not injure the surety (Brief, pp. 25-29). As the Solicitor General in the earlier part of his brief urges that the precise time of beginning was so material as justify an annulment for a failure to comply, we have certainly a change of a *material* clause. That releases the surety whether it helps or hurts him.

WM. MARSHALL BULLITT,
Counsel for Plaintiff in Error.

APRIL 15, 1914.

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

STONE, SAND AND GRAVEL COMPANY AND AMERICAN SURETY COMPANY OF NEW YORK, PLAINTIFFS IN ERROR,
v.
THE UNITED STATES.
No. 302.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The facts are fully and fairly stated in the brief for the plaintiffs in error. One feature of the case, however, requires special emphasis here, namely, the confessed breach of the contract by the contractor and the circumstances under which the contract was annulled by the Government. In this connection the pertinent provisions of the contract are as follows:

> * * * Within six (6) months of notice of award of contract, the contractor will be required to have in active operation a plant of a

capacity of not less than 260,000 cubic yards per month. But he may begin at an earlier date, provided the plant first put in operation shall have a capacity of not less than 65,000 cubic yards per month. (R. 54.)

The said Stone, Sand and Gravel Company shall commence active operation under this contract on or before the fifth day of December, eighteen hundred and ninety-nine (1899), with sufficient force and plant for an output each calendar month of not less than two hundred and sixty thousand (260,000) cubic yards per month, which shall be increased on or before the fifth day of June, nineteen hundred (1900) with sufficient force and plant for an output each calendar month of not less than three hundred and thirty thousand (330,000) cubic yards per month.

Provided, however, That if work shall commence before the date first above written in this paragraph the plant first put in operation shall have an assured capacity of not less than sixty-five thousand (65,000) cubic yards each calendar month, until December 5, 1899, and work shall not begin with less output. (R. 63.)

It thus appears that the contractor was bound to begin work with an equipment of a capacity of not less than 260,000 cubic yards per month not later than December 5, 1899, or it might at its own option begin earlier if its equipment was capable of 65,000 cubic yards per month. The facts disclose that it did neither. On September 1, 1899, work of a purely

experimental character was begun under the permissive clause but not with an equipment of the required capacity (R. 134, 149, 194, 195). Of course, this lack of equipment did not then amount to a breach of contract, as there was no obligation to do any experimental work; but at the same time it did not constitute commencing the work within the meaning of the contract. At the request of the contractor (R. 173–178) the time for the formal beginning was postponed to January 24, 1900 (R. 148, 194). When that date arrived, the contractor had still failed to assemble a plant of the required capacity with which to begin the work (R. 151), and accordingly the contract was annulled, notification to that effect being mailed to the contractor on March 7, 1900 (R. 155).

BRIEF OF ARGUMENT.

I. The Government's right of action on the breach was not lost by annulling the contract.

II. The measure of recovery for the breach was the excess cost of completing the work and was not limited by Clause A to liquidated damages.

III. The defendant surety company was not discharged by the extension of time.

IV. The contract with the Atlantic, Gulf & Pacific Company was competent evidence to show the excess cost of completing the work.

ARGUMENT.

I.

The Government's right of action on the breach was not lost by annulling the contract.

The so-called annulment of the contract was in reality nothing more than a repudiation of it by the Government on common-law principles independently of any provision in the contract, and it follows as of course that the Government's right of action was not lost thereby. The annulment was "merely a ceremony to mark the point of default as a preliminary to employing some one else." But even if it be conceded that the annulment took place only by reason of Clause A in the contract, the argument of the defendants in the Circuit Court of Appeals that such action operated as a technical rescission *ab initio* is untenable. That argument is not repeated here, and indeed it could not well be, in view of the decisions of this court in *United States* v. *O'Brien*, 220 U. S. 321, and *United States* v. *McMullen*, 222 U. S. 460. It will be sufficient to quote the following passage from the opinion in the *McMullen* case (p. 471):

> The next argument that seems to us to need a word is on the effect of the election of the United States to annul the contract, as it was said. The infelicity of the word annul has been adverted to and its meaning explained heretofore. If notice had been given before

the final breach and abandonment, it would have meant simply that the United States would proceed no further with the contractor under the contract, not that it rescinded or avoided it. *Philadelphia, Wilmington & Baltimore R. R. Co.* v. *Howard*, 13 How. 307, 340. *United States* v. *O'Brien*, 220 U. S. 321, 328.

II.

The measure of recovery for the breach was the excess cost of completing the work and was not limited by clause A to liquidated damages.

Admitting a right of action for breach of the contract in the Government, it is insisted for the plaintiffs in error that the contract limits the measure of recovery to liquidated damages, and that it was therefore error to allow the Government actual damages.

The clause which gives rise to this contention provides (Clause A, R. 63, 64):

> If in any event the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the chief of engineers, to

> annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and, upon the giving of such notice [*i. e.*, notice of annulment by the engineer], all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States, and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States.

Toward the end of the contract occurs the following additional provision (Clause B. R. 65):

> It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, all sums due and percentage retained shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same.

The argument is in the main that since Clause B expressly provides for actual damages while Clause A does not in terms do so, the latter clause must be taken as a provision for liquidated damages; and that the annulment here having taken place under Clause A, the Government's recovery is accordingly limited to the reserved percentages as therein provided.

These clauses were used by the Government in its Standard Engineering Contract (Form 19, R. 62) for years, and were again and again construed by courts and administrative officers as providing for a penalty and not liquidated damages.

2 Comp. Dec. 579.
20 Op. Atty. Gen. 511.
Kennedy v. *United States*, 24 Ct. Cl. 122.
Pigeon v. *United States*, 27 Ct. Cl. 167.
Satterlee v. *United States*, 30 Ct. Cl. 31.
United States v. *Maloney*, 4 App. Cas. (D. C.) 505.

This is not and can not be denied. It is contended, however, that this settled construction has been upset by the case of *United States* v. *O'Brien*, 220 U. S. 321, which was decided after the first decision of the Circuit Court of Appeals (177 Fed. 321) in the case at bar had been rendered. In fact, the *O'Brien* case was the sole cause of the second writ of error to the Circuit Court of Appeals, and is frankly relied on here as controlling. The principal question, therefore, is whether that case and the present one are distinguishable.

In the *O'Brien* case the contract (Form 19), containing Clauses A and B, provided that the contractors should begin a work of excavation on March 1, 1899, and complete the same by July 1, 1902. There was no amount of excavation agreed upon as a monthly minimum nor any standard of diligence set up by the contract itself other than the agreement to complete by a day certain. The work was begun on time and continued until January 1, 1901, when the Government annulled the contract under Clause A on the ground that "in the judgment of the engineer in charge" the contractor had failed "to prosecute faithfully and diligently the work in accordance with the specifications of the contract." There was at that time some $8,000 in reserved percentages in the Government's hands, which was retained, and the work having been relet at an excess price amounting to $76,470, suit was brought to recover that sum. It was held that the contract should not be construed as vesting in the engineer in charge absolute discretion as to whether or not a breach had been committed regardless of the facts, and that since it appeared that at the time of the annulment the contractor *might* have completed the work on time, there was no breach in fact, and a recovery was accordingly denied. This was unquestionably the ground upon which the decision was based, as appears from the following passage from the opinion (p. 327):

> * * * In this case it was admitted that there was time enough left to finish the work under the contract when the defendants were

> turned off. It would be a very harsh measure to pronounce the contract broken when but for the prohibition of the United States the defendants might have done the work in time.

No breach having in fact occurred, the Government's right to annul depended entirely upon Clause A, and it was held that the measure of damages applicable to the situation must be found in that clause, which was thus construed by the court (p. 327):

> Again, the later paragraph that we have quoted, giving the right to recover expense of completing the work in excess of the original price, gives that right only "in case of failure * * * to complete this contract as specified and agreed upon." On their face these words mean failure to complete by July 1, 1902, not failure to complete because turned off by the engineer in charge, a year and six months before that time arrived, when competent persons still might do the job. The earlier clause under which the so-called annulment took place provides for no such consequence, but only for a forfeiture of reserved percentages and money due. It is true that the expression of the right to proceed to provide for the completion of the contract and the reference to Rev. Stat., § 3709, hardly belong in that part of the contract unless the defendants are liable for the expense, but the contract does not show technical accuracy enough to give this consideration great weight. If the United States wants more it must say so in plainer words.

In other words, the Government could not recover more than was expressly given by the contract for the infringement of a right dependent for its existence solely upon a special provision of the contract. In the language of the court (p. 328)—

> * * * if the contract were made naught by the Government's election and notice, all rights under it would be at an end, whereas it provides in terms that rights shall arise upon annulment, which *but for this provision in the contract the Government would not have. The suit is upon the contract, but the United States asks more than in our opinion the contract gives.*

The question, therefore, before the court was, What rights did the contract *give?*

In the case at bar, on the other hand, there was admittedly a breach of contract. It is contended, however, that it was not such a breach as would have justified the Government in repudiating the contract without the help of Clause A, and that the Government's rights therefore are wholly dependent upon the contract as in the *O'Brien* case. If the major premise upon which this argument proceeds were sound the *O'Brien* case would undoubtedly be controlling; but it is utterly without foundation. In the instant case there was a complete failure to begin work with the required equipment not only on the original date (December 5, 1899) set out in the contract, but also on a day more than seven weeks later (January 24, 1900), to which the time of commencing work had been postponed through the indulgence of

the Government's representatives. But this is not all. If the contractor had been in a condition of readiness to begin work shortly after the second date it might be plausibly asserted that the breach was not one going to the essence. But, by the admission of its own secretary as a witness in its behalf, the Stone, Sand and Gravel Company could not have been ready to begin work at best for "some three or four months" (R. 137), and the fulfillment of this prophecy was rendered still more remote by the fact that the company went into the hands of a receiver about February 1, 1900 (R. 150). Assuming that Clause A had not been in the contract, can it be seriously contended that the Government would have been obliged to wait until the contract period had expired before reletting the work? Without question such a breach as the present would have been vital to any construction contract, to say nothing of one involving a public work of the greatest importance and urgency. Moreover, both by the letter of the contract and the subsequent conduct of the parties time had been expressly made the essence of the agreement. Upon elementary principles the Government had a right to repudiate the contract and is entitled to recover actual damages for the breach.

Norrington v. *Wright*, 115 U. S. 188.
Cleveland Rolling Mill v. *Rhodes*, 121 U. S. 255.
Johnson v. *Allen*, 78 Ala. 387.
Bollman v. *Burt*, 61 Md. 415.
Pope v. *Porter*, 102 N. Y. 366.

Such being the case, this right of recovery still remains in the Government unless it has been contracted away by Clause A. The situation, then, is just the reverse of what it was in the *O'Brien* case. Instead of the question being, Does the contract *give* the Government an extraordinary right to damages, it is, Does the contract *take away* an ordinary right to damages.

The Government's position is simply this: Where a right to annul exists only by virtue of Clause A, then the sole measure of damage is that prescribed by Clause A, namely, the reserved percentage or money due to the contractor in the hands of the Government; but where the right to annul or repudiate exists independently of Clause A, then the measure of damages therein prescribed has no application, and actual damages may be recovered.

The distinction is illustrated by the *O'Brien* case, *supra*, and the *Maloney* case, *supra*. In the former, as pointed out above, the annulment was for failure to prosecute the work to the satisfaction of the engineer in charge, under circumstances not amounting (as the court held) to a breach of contract. Under these circumstances, the Government's recovery was properly limited to the reserved percentages in its hands, since there could have been no annulment independently of Clause A. In the latter, the annulment was for failure to begin the work on time (just as it was here), which amounted to a breach going to the very essence of the contract, and it was held that

the Government could recover actual damages, because the breach was of a nature which would have justified a repudiation of the contract independently of Clause A. The *Maloney* case was not mentioned in the opinion of this court, in the *O'Brien* case, but was thus distinguished by the Circuit Court of Appeals in the *O'Brien* case (159 Fed. 671, 674):

> It will not be necessary to review in detail the many authorities cited in support of the judgment. Those in which there was *a completed breach* of the contract, and those where the contract did not in terms provide for just what should be the consequences in the event of annulment in advance of the time allowed, are not persuasive here. In one of them *U. S.* v. *Maloney*, 4 App. Cas. D. C. 505, the contract was identical with the one at bar. * * *
>
> In the Maloney Case the contractor wholly failed to do any work whatever. He wholly failed to "commence work on or before the 16th day of June, 1891," which he had expressly agreed to do. *There was a complete breach of the contract before action was taken under the annulment clause.*

The same view was taken in the instant case by the Circuit Court of Appeals in its second opinion, when it thus distinguished the *O'Brien* case from the case at bar (R. 206):

> * * * Analysis of the O'Brien case will disclose that it is clearly distinguishable from the case at bar. In that case there was no breach of contract, and it was held, under

> the facts appearing of record, that the Government could not declare a breach so as to hold the contractors liable in damages for failure to perform. * * *
>
> In the present case there was an utter failure on the part of the contractor to perform his contractual obligations, and the government, on that account, was compelled to relet the contract to other parties. Bearing in mind this distinction we are of the opinion that the ruling, made by this court upon the first writ of error, is not in conflict with the views expressed by the Supreme Court in the O'Brien case.

Our precise contention therefore is that the present case is controlled by the *Maloney* case rather than by the *O'Brien* case. In fact it would be difficult to find two cases more completely "on all fours" with each other than the *Maloney* case and the case at bar. The contracts involved were identical, the breaches sued on were identical, and the measures of damages applied were identical.

The construction of Clause A for which we contend does not, on the other hand, deprive that clause of a legitimate field of operation. If a contractor commits a breach at the threshold of the contract which does not go to the essence, or if he fails to prosecute the work to the satisfaction of the engineer in charge, the clause confers upon the Government the right to annul the contract, to relet the work, if necessary, under section 3709 of the Revised Statutes, and to retain all reserved percentages and money due to the

contractor. These are three rights which the Government would not otherwise have had, and they are also rights for which it would be likely to stipulate; for in no other way could it get rid of a contractor who, though delinquent and incompetent, might not commit a breach going to the essence. For example, if Clause A had not been in the contract in the *O'Brien* case, the Government, by turning the contractor off the job, would have rendered itself liable to him in damages for a breach of contract. But for the very reason that the right of annulment in such a case is conferred by Clause A, its money value is dependent upon the provisions of that clause.

None of these considerations apply to the right of annulment for a breach going to the essence of the contract. That right is inherent in every party to a contract independently of any contract provision, and its money value has been fixed by law for centuries. It is, therefore, exercisable by the Government in this case unless it has been stipulated away by Clause A. We contend that this has not been done for the following reasons:

(*a*) The primary purpose of Clause A, as indicated above, was to vest in the Government an extraordinary right of annulment, and to fix its money value. It would be a strange and unnatural construction to say that that clause at the same time took away from the Government a far more valuable right than it conferred; that it was in effect a double-edged sword

more potent against the party who drew it than him against whom it was drawn.

(*b*) If the Government's recovery is to be limited to all money or reserved percentage due or to become due to the contractor, it follows that the measure of damages in the instant case will be *nil*, since there is obviously no money or reserved percentage due or to become due to a contractor who breaks his contract by failing to even commence work on the specified day.

It is true that here the contractor claimed $6,206.69 which represented the amount which would have become due for its experimental work prior to the time when the regular work was to begin, if that work had measured up to the requirements of contract. This sum was allowed by the court, apparently without contest, as a credit on the amount of the Government's claim. Had the Government seen fit to contest the point it might well have done so, denying the defendants' right to the credit, not by virtue of Clause A, but under another independent provision to the effect that no money should be paid for work which did not measure up to the requirements of contract (R. 65, 66).

But be that as it may, and admitting that in this case the Government had a little money which might have become due to the contractor if the contract had been complied with, still Clause A must be construed in the light of all possible contingencies, and manifestly cases will arise in which there was no pre-

liminary work and hence no money whatever in the Government's hands. In these cases it can not be denied that the construction contended for by the plaintiffs in error would result in not one cent of damages to the Government.

(*c*) The construction urged by the defendants is entirely inconsistent with the two bonds which the Government required of the contractor. One of these was given in connection with the bid, and provided that if the contractor failed to enter into a contract as proposed, he should pay all damages, including those specifically stated as the excess cost of doing the work under a new contract. This would have been an idle ceremony, indeed, if, after the contract had been executed, the contractor was to be at liberty to postpone commencing the work with impunity so far as damages were concerned. The other bond, upon which this suit is brought, was for $75,000 to secure the faithful performance of the contract. Why was this required by the Government, if the performance of the contract could be refused *in limine* without a resulting right to recover a single cent under the bond?

(*d*) No reason is or can be assigned why the Government should have reserved to itself by Clause B the right to recover actual damages for a failure to complete the contract, and yet contracted away by Clause A the right to recover similar damages for breaches at or near the beginning of the contract when the damages would be greater than in the

former contingency. Nor is the fact that Clause B specifically gives actual damages for a failure to complete the work evidence that in that event only would the Government claim such damages. That clause simply declares the ordinary rule of damages for such a breach, and was thus put into the contract out of abundant caution; but because the Government was careful in one part of the contract is no reason for inferring that it was reckless in another.

It thus appears that the construction of Clause A for which we contend, viz, *that it does not apply to breaches going to the essence of the contract*, harmonizes the only two cases in which it has been construed, is consistent with the intention of the parties, and does equity; and, moreover, that it is not inconsistent with the language of the contract nor with the presence of Clauses A and B therein.

It is insisted by the defendants, however, that the annulment, having taken place under Clause A, the measure of damages is accordingly to be governed by that clause. It is true that the letter of the Major of Engineers informing the defendants of the annulment was couched in the language of Clause A; but the decisive point is that the annulment did not depend for its validity upon *any* provision of the contract, but upon the inherent right which the law gives every party to a contract to repudiate it upon a breach by the other party going to the essence thereof. Such being the case, the form of the annulment was immaterial. This is made clear by

the recent case of *Graham* v. *United States*, 231 U. S. 474, in which the Government annulled the contract for a refusal by the contractor to complete the work. It was claimed that the annulment had not been authorized by the proper parties as required by the terms of the contract. The court, however, held otherwise, since it appeared that there had been a plain breach of contract, saying (p. 477):

> * * * The provision as to the annulment, construed in *United States* v. *McMullen*, 222 U. S. 460, 471 and cases cited, referred to the cases where there was a failure to prosecute the work diligently in the judgment of the secretary and allowed a revision of that judgment in cases of that sort, before the United States should decline to proceed further and complete the work by other means. But when Graham refused to go on, there was no question of judgment to be revised but *a plain breach* of the contract unless the refusal was justified, and a right of action accrued *without the need of a ceremony that would have had no meaning or use.*

So in this case the so-called annulment was in reality a repudiation of the contract because of a plain breach, and hence the form in which it was made could not change the rights which accrued to the Government under it. The annulment in the *Maloney* case was also made under Clause A, but since it was unnecessary there to resort to a provision in the contract, just as it was here, the court held

that it did not limit the Government's right to recover actual damages for the breach.

The same principle was applied in *United States* v. *McMullen*, *supra*. There the annulment took place after the time for the completion of the work had expired—*i. e.*, for a plain breach of contract. It was contended that the annulment was equivalent to a rescission which divested the United States of any right to sue on the breach, but the court held that it was nothing more than an ordinary repudiation, saying (p. 471):

> * * * At the time when the notice was given it was merely a *ceremony to mark the point of default as a preliminary to employing some one else*. The obligations of the contract, so far as applicable to a case of default, remained in full force. The United States had a right to get some one else to complete the work and to charge the defendants with the reasonable difference in cost.

III.

The defendant surety company was not discharged by the extension of time.

There is no evidence of any express consent by the surety to the granting of the extension in question, and it is argued that the only extensions contemplated in the contract and the bond were those which might be granted as a result of *unavoidable* delays in the commencement or completion of the work and that to extensions of this character alone had it

consented; that the extension granted to the contractor by the Government in this case was for an avoidable delay, not contemplated in the contract, by which the defendant was discharged from all liability under the familiar rule of *strictissimi juris*.

We contend that this defense must fail for two reasons:

1. The surety consented in advance to the extension which was granted to the contractor.

2. Even if the surety did not so consent, it was not discharged by the extension, since it suffered no damage thereby.

(1) The pertinent provisions of the specifications and the contract proper are as follows:

> Should the time for the completion of the contract be extended, all expenses for inspection, and superintendence during the period of the extension, the same to be determined by the engineer officer in charge, shall be deducted from payments due or to become due to the contractor; provided, however, that if the party of the first part shall, in the exercise of his discretion, because of freshets, ice, or other force or violence of the elements, or because of local or State quarantine restrictions, allow the contractor additional time in writing as provided for in the form of contract, there shall be no deduction for the expenses for inspection and superintendence for such additional time so allowed; provided further, that nothing in these specifications shall affect the power of the party of the first part [the United States] to annul the contract as provided for

in the form of contract adopted and in use by the Engineer Department of the Army. (R. 49.)

* * * provided, however, that if the party (or parties) of the second part shall by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon. (R. 64.)

The bond for the faithful performance of the contract was conditioned as follows (R. 102):

Now, therefore, if the above bounden Stone, Sand & Gravel Company shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions and agreements in and by the said contract agreed and covenanted by said Stone, Sand & Gravel Company, to be observed and performed according to the true intent and meaning of the said contract, *and as well during any period of*

extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue.

The grounds upon which the extension was asked are set forth in a letter from the Stone, Sand & Gravel Co. to Major Willard, the engineer in charge, dated Nov. 25, 1899 (R. 174, 177):

> Owing first to the unavoidable loss of time spent in getting the knowledge of the materials to be excavated and necessary to determine the kind of plant best adapted to the work; secondly to the fact that the dredge building shops of the country were crowded with work beyond all precedent, and to such a degree that none of them would contract and deliver the plant required within the contract time; thirdly, that the mills could not furnish the scows within the required time; and, fourthly, that owing to the prevalence of yellow fever and establishment of quarantine during six weeks, obstructed our work and negotiations for our machinery, it has been and may be impossible for us, in spite of the most energetic efforts which we have made and which is evidenced by the correspondence herewith submitted, to complete the plant necessary to excavate 10,000 yards per day by the 5th of December next.

The extension was presumably granted on some or all of these grounds as appears from the following letter (R. 148):

> UNITED STATES ENGINEER'S OFFICE,
> *Vicksburg, Miss., Dec. 8, 1899.*
>
> Mr. S. V. FORNARIS,
> *Prest. Stone, Sand & Gravel Co.,*
> *Rooms 203 and 205 Cora Building,*
> *New Orleans, La.*
>
> SIR: Your letter of November 25, 1899, applying for extension of time until January 24, 1900, for commencing work with full output, under contract of June 14th, 1899, for excavation for diverting mouth of Yazoo River, was received and forwarded to the chief of engineers, U. S. Army, November 27, with recommendation that the desired extension of fifty days be granted.
>
> My recommendation was approved by the chief of engineers December 2, 1899.
>
> Very respectfully,
> J. H. WILLARD,
> *Major, Corps of Engineers.*

It will be observed that the bond is given to cover "any period of extension of said contract that may be granted on the part of the United States." There is no restriction on this phrase. Apparently the purpose of the surety was to remain bound so long as the contractual relation between the Government and the contractor should endure. If the surety meant to be bound only during such extensions as were provided for on the face of the contract and for

causes therein stated, it should have written its bond accordingly.

It is apparent from the first two clauses of the contract quoted above that the parties contemplated that extensions of time might be granted for *any* delay, the nature of the delay being important only as determining the rights of the parties during the extended period. Thus, if the extension was granted for avoidable delays, certain expenses incident thereto should fall on the contractor; but if it was granted for unavoidable delays, these expenses should fall on the Government. Again, if the contractor failed to commence the work on time or to prosecute it satisfactorily, the Government might annul the contract, but with this proviso, that if the failure was due to unavoidable delays, the right to annul might be waived by the granting of an extension of time.

Both in language and purpose the surety must be held to have consented in advance to the extensions here in question.

United States v. *McMullen, supra.*
Graham v. *United States, supra.*

(2) But even if the defendant should prevail in the contention that its consent to the extension of time can not be implied from the contracts and the bond, it is still possible to negative the effect of the extension on the ground that the defendant, being an incorporated surety company, suffered no damage thereby. The modern doctrine is that the rule of *strictissimi juris* so often invoked by individual

sureties is not applicable to surety companies who carry on the suretyship business for profit, and who are in reality insurers rather than sureties. It is accordingly a well-recognized rule that alterations of the principal obligation, including extensions of time for performance or payment, will not release a surety company, unless it can show that it has been injured thereby.

In *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, the defendant surety company had guaranteed that the obligor would faithfully perform his contract and that he would promptly pay all persons supplying him labor or materials. A material man gave the obligor credit by accepting notes payable in the future, and subsequently brought suit against the surety company, which claimed to be discharged by the extension. The court declined to pass upon the general question whether the rule of *strictissimi juris* is applicable to surety companies, and simply held that owing to the uncertain character of the obligation guaranteed the defendant was not discharged, since there was no proof that it had been damaged by the extension.

Toward the close of the opinion, however, it was said (p. 426):

> The rule of *strictissimi juris* is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation, which has

undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor.

In *Atlantic Trust & Deposit Co.* v. *Town of Laurinburg* (C. C. A. 4th C.), 163 Fed. 690, certain material alterations were made in the principal contract by reason of which the defendant surety company claimed to be discharged, although it appeared that the changes were all in favor of the contractor. The court thus disposed of this contention (p. 695):

> * * * Fully recognizing the rule of strictissimi juris as applying to contracts growing out of the ordinary relation of creditor and simple surety, we cannot and do not recognize this rule as applying to contracts written by these bonding corporations, whose business it is (and a profitable one, too, it would seem, from the number organized and existing) to insure, for a monetary consideration, the obligee against a failure of performance on the part of the principal obligor. In such cases, before such bonding company can be released, it must show that the changes made in a contract like this, guaranteed by it, operated injuriously to affect its rights and liabilities.
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> * * * * *
>
> The very reason for the existence of this kind of corporations, and the strongest argument put forward by them for patronage, is that the embarrassment and hardship growing out of individual suretyship that give application for this rule is by them taken away; that it is their business to take risks and ex-

> pect losses. If, with their superior means and facilities, they are to be permitted to take the risks, but avoid the losses, by the rule of strictissimi juris, we may expect the courts to be constantly engaged in hearing their technical objections to contracts prepared by themselves. It is right, therefore, to say to them that they must show injury done to them before they can ask to be relieved from contracts which they clamor to execute. In this case no injury, but benefit, came to this defendant from all the changes made, and from the town's guaranteeing the material order and advancing the money for the contracting company to advance and perform the work, and its exceptions because of these are groundless.

In *Baglin* v. *Title Guaranty & Surety Co.* (C. C. Pa.), 166 Fed. 356, 363 (affirmed C. C. A. 3d C., 178 Fed. 682), the same rule was adopted in the following language (p. 363):

> Nor is there any reason to be astute in looking about for flaws that may invalidate the transaction. The defendant is not entitled to the tender consideration that is accorded to an individual surety who is a mere volunteer. Surety companies are not to be so described; they are insurers, paid for their services, bound by contracts which are usually carefully drawn by themselves, and, as a general rule, satisfactorily secured by counter indemnity. They perform a most useful, and indeed, according to modern custom, an indispensable function in the business and legal world,

> but they differ so much from an individual surety of the ordinary type as to render inapplicable some of the reasons that have led the courts to guard the rights of the individual surety with jealous care. * * *

To the same effect are:

Hill v. *American Surety Co.*, 200 U. S. 197, 201.

United States v. *Lynch* (D. C. Del.), 192 Fed. 364.

Graham v. *United States* (C. C. A. 4th C.), 188 Fed. 651, aff'd, 231 U. S. 474.

United States v. *U. S. Fidelity & Guaranty Co.* (C. C. Pa.), 178 Fed. 721.

U. S. Fidelity & Guaranty Co. v. *United States* (C. C. A. 3d C.), 178 Fed. 692.

Young v. *American Bonding Co.*, 228 Pa. St. 373.

There being no allegation nor proof that the extension granted to the contractor in the present case in any way damaged the defendant surety company, it follows that the latter is not discharged even if the extension was granted without its consent.

IV.

The contract with the Atlantic, Gulf & Pacific Company was competent evidence to show the excess cost of completing the work.

Finally, it is claimed by the defendants that even if they are liable for actual damages for the breach of the original contract, the contract with the Atlantic, Gulf & Pacific Company (hereinafter re-

ferred to as the new contract) was inadmissible as evidence of those damages, because it contained certain provisions not found in the original contract, which, as the defendants insist, tended to cause bidders for the work to ask a higher price than would have been asked if the contract had been let under the precise terms of the original contract. The provisions which are particularly complained of are as follows:

(1) The new contract contained two provisions, one in the specifications (R. 108), and another in the articles of agreement (R. 124), by which the contractor bound himself to save the United States harmless against all claims arising out of the infringement of patents caused by work done or materials furnished under the contract. It is true that neither of these provisions or their exact equivalent appeared in the old contract. That instrument, however, contained a provision to the effect that the contractor should be responsible for and pay all liabilities incurred in the prosecution of the work *for labor and material* (R. 65). Inasmuch as he had to furnish all labor and material (R. 62), it is perfectly clear that under the old as well as the new contract he would have been liable for any damage arising from the infringement of patents by such labor and material. The new contract therefore was merely declaratory of what must necessarily have been implied from the old.

(2) The new contract contained a provision not to be found in the old contract, by which the contrac-

tor agreed, in case he failed to complete the contract as specified, to be liable for all cost of inspection and superintendence incurred by the United States during the period of delay (R. 122). But here again the new contract only declared specifically an element of damage which was clearly included in the provision of the old contract (Clause B), by which the Government was given the right, upon a failure by the contractor to complete the work on time, to recover "any or all damages due to such failure," in addition to the excess cost of completion (R. 65). In other words, the old contract provided for actual damages which covered the cost of inspection and superintendence specifically mentioned in the new contract.

(3) While both contracts provided that the decision of the engineer officer in charge as to work done and materials furnished should be final (R. 49, 108), the new contract contained an additional clause by which it was declared that no such decision should be construed as a waiver by the Government of the right to reject any defective work or material (R. 123, 124). Undoubtedly this clause gave the United States a right which it did not have under the old contract, *i. e.*, the right to reverse *any previous* decision approving of defective work and materials; but as a practical matter the change was of minor importance, for even under the old contract the Government could have reversed a favorable decision as to work and materials containing latent defects which could not have been

discovered at the time (*United States* v. *Walsh*, 115 Fed. 697), and decisions of this sort would ordinarily be the only ones which it would wish to reverse. Hence the new clause must have had little or no tendency to raise the bids for the work, especially since it would prove onerous only to contractors who intended to use defective work and materials, and feared ultimate detection by the Government.

(4) The new contract provided that actual damages might be recovered if the contractor failed to commence the work on time or to prosecute it to the satisfaction of the engineer in charge (R. 122, 123), while for like defaults under the old contract it is claimed that only the reserved percentages could be recovered (R. 63, 64). This construction of the old contract has been adopted by this court where there is a failure to prosecute the work satisfactorily (*O'Brien* case, *supra*), it is true; but at the time the Stone, Sand and Gravel contract was made the settled construction was, as pointed out above, that the old contract gave actual damages, or exactly the same damages as the new contract gave when it was executed by the Atlantic, Gulf & Pacific Company. Any attempt, therefore, to disqualify the new contract as evidence on this ground is manifestly futile. Bidders under both forms before the *O'Brien* case must have thought that they would be liable for actual damages in all cases.

On the other hand, the new contract contained the following provisions, which are undoubtedly more

favorable to the contractor than those of the old contract:

(1) The new contract allowed the contractor six months in which to assemble his plant, etc. (R. 121), as against five months and a half under the old contract (R. 62, 63).

(2) The new contract allowed the contractor thirty months within which to complete the work (R. 121), without specifications as to monthly progress, as against twenty-four months at a specified rate of progress each month under the old contract (R. 63). It is stated in the opposing brief that there was no time limit within which the work had to be completed under the old contract; it is true that there was no time limit *qua* time limit expressly mentioned therein, but the same result was reached by requiring the contractor to maintain an average excavation of 260,000 cubic yards per month for the first six months, and thereafter an average of 330,000 cubic yards per month (R. 63), which requirements would cause the work (7,500,000 cubic yards) to be finished in exactly two years. And inasmuch as the contractor was to receive no pay for a month's work below the required amount until he made up the deficiency in a later month (R. 65), it appears that there was a very real time limit.

(3) The new contract contained no such clause as to payments; it authorized monthly disbursements

regardless of the amount of work done, less the regulation ten per cent (R. 112, 124).

(4) The new contract required no guaranty from the contractor to make prompt payments to all persons supplying labor and materials for the prosecution of the work, as the old contract did (R. 63).

(5) The new contract authorized the granting of an extension of time for commencing or completing the work if the delay was caused by epidemics, freshets, ice, local or State quarantine restrictions, or force or violence of the elements (R. 122); while the old contract authorized such extensions if the delay was caused by freshets, ice, or other force or violence of the elements (R. 64).

From the foregoing it is evident not only that the changes in the new contract complained of by the defendants were in all respects unsubstantial, but also that as to plans and specifications, which necessarily have the greatest influence with bidders, the new contract was undoubtedly more favorable to the contractor than was the old. Under these circumstances the remarks of the Circuit Court of Appeals with reference to this feature of the case may well be repeated here (177 Fed. 321, 326):

> We have read and compared the two contracts in question with studious care, and conclude that the defense attempted to be built on variance in their wording is highly artificial and without substance.

It follows, therefore, that the new contract was clearly admissible as representing the reasonable cost of completing the work which the defaulting contractor failed to do.

Graham v. *United States, supra,* 481.
United States v. *McMullen, supra,* 471.
Baer v. *Sleicher* (C. C. A. 6th C.), 153 Fed. 129.
New York v. *Second Ave. R. R. Co.,* 102 N. Y. 572.

CONCLUSION.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

JOHN W. DAVIS,
Solicitor General.

FRANCIS H. MCADOO,
Special Assistant to the Attorney General.
APRIL, 1914.

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STONE, SAND AND GRAVEL COMPANY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 302. Argued April 23, 1914.—Decided June 8, 1914.

Where the contract contains a provision for a method of annulment and liquidated damages in case of a breach by failure to commence work and the Government avails of that provision it is only entitled to the liquidated damages and cannot recover damages for difference in cost on reletting the contract under a provision for failure to complete or abandonment after commencing the work. *United States* v. *O'Brien*, 220 U. S. 321, distinguished.

The benefit and burden of a provision in a Government contract giving a right to annul in consequence of a breach by failure to commence work must hang together and the Government cannot avail of the former without accepting the latter.

195 Fed. Rep. 68, reversed.

THE facts, which involve the liability of a contractor and its surety under a contract with the Government for excavation work, are stated in the opinion.

Mr. William Marshall Bullitt, with whom *Mr. Henry C. Willcox* and *Mr. T. M. Miller* were on the brief, for plaintiffs in error:

The contract as construed in *United States* v. *O'Brien*, 220 U. S. 321, means: Clause A: If the contractor (1) fails to begin work on the day specified or (2) fails (in the judgment of the Government engineer) to prosecute the work faithfully, then the United States may annul the contract, i. e., refuse to perform it further; in which event the United States may keep all money or retained percentages in its hands, but shall have no further damages.

Clause B: On the other hand, if the contractor fails to

complete work by the time agreed on, whether such failure be due to (1) a repudiation or refusal amounting to an anticipatory breach or (2) abandonment after doing some work or (3) mere failure to complete though still working at the expiration of the contract period, then in either such event, the United States may recover the excess cost of completing the work. *Farrelly* v. *United States*, 159 Fed. Rep. 671; *United States* v. *O'Brien*, 163 Fed. Rep. 1022; *S. C.*, 220 U. S. 321.

When the United States annulled the contract and retained the $6,206.69 money or reserved percentage due the contractor (which clause A authorized it to retain), then *ipso facto* the United States exercised the sole, exclusive and entire right it had under the contract; and it cannot hold the contractor liable for the excess cost of completing the work, which it had, by annulment, prohibited the contractor from further trying to perform.

Clause A calls for liquidated damages. *United States* v. *O'Brien*, 220 U. S. 321; *Sun Printing Ass'n* v. *Moore*, 183 U. S. 642, 669; *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119.

As clause A fixed the forfeiture of retained pay as the penalty to a contractor upon an annulment under the conditions specified in clause A, the United States cannot claim an inherent right to further damages under clause A. *United States* v. *O'Brien*, 220 U. S. 321, 327.

Clause B (which is the only clause in the contract permitting the United States to recover the excess cost of completion) never came into operation against the contractor; and hence no recovery can be had under its provisions. The petition does not declare upon a breach of clause B. There is no "failure to complete" when the contractor is stopped from further work by an annulment of his contract. Cases *supra*.

There were two independent grounds why there could be no recovery in the *O'Brien Case*, both of which exist here.

See also *Quinn* v. *United States*, 99 U. S. 30; *Sparhawk* v. *United States*, 134 Fed. Rep. 720; *United States* v. *McMullen*, 222 U. S. 460; *Graham* v. *United States*, 231 U. S. 474; *United States* v. *Maloney*, 4 App. D. C. 505.

The American Surety Company was released by reason of the 50 days' extension of time, which the United States granted to the contractor without the knowledge or consent of the surety; which extension was not made pursuant to any reserved power in the contract.

The time of beginning was material and was of the essence of the contract.

The extension of time for beginning was permissible only for freshets, ice, etc. *United States* v. *Gleason*, 175 U. S. 588, 604.

The extension was not granted on account of freshets, ice, etc.

The contractor gave a valuable consideration for the extension; it was not a mere forbearance by the Government.

The surety never consented in advance to the extension except on account of freshets, ice, etc.

The surety was released by the extension. *Reese* v. *United States*, 9 Wall. 13; *Earnshaw* v. *Boyer*, 60 Fed. Rep. 528; *United States* v. *Freel*, 186 U. S. 309. *United States* v. *McMullen*, 222 U. S. 460, and *Graham* v. *United States*, 231 U. S. 474, distinguished.

Even if defendants are liable for all the damages suffered by the Government, the excess cost of completing the work under the Atlantic Gulf and Pacific Co. contract, is not the proper measure of damages, owing to vital differences between the original contract and the relet contract.

Excess cost of completion is the proper measure of damages, but it must be for doing substantially the same work, under substantially the same conditions as the original

contract called for. *United States* v. *McMullen*, 222 U. S. 460, 467; *Graham* v. *United States*, 231 U. S. 474, 481; *United States* v. *Weisburger*, 206 Fed. Rep. 641, 645; *United States* v. *U. S. F. & G. Co.*, 194 Fed. Rep. 611, 615, 617; *Am. Bonding Co.* v. *United States*, 167 Fed. Rep. 910, 915, 922; *Chesapeake Transit Co.* v. *Walker*, 158 Fed. Rep. 850, 856, 858; *United States* v. *Walsh*, 115 Fed. Rep. 697; *City of Goldsboro* v. *Moffat*, 49 Fed. Rep. 213, 216.

The relet contract contained five new and more onerous conditions, which increased the cost of the work, and hence destroyed the value of the excess cost as a true measure of damages.

Clause A was changed to impose the excess cost of completion as a penalty for being slow; indemnity was required against patents; definite time limit imposed; cost of superintendence was imposed; the United States retained the right of rejection, and compelled the contractor to guarantee work as a whole.

The Solicitor General, with whom *Mr. Francis H. McAdoo*, Special Assistant to the Attorney General, was on the brief, for the United States:

The Government's right of action on the breach was not lost by annulling the contract. *United States* v. *McMullen*, 222 U. S. 460; *United States* v. *O'Brien*, 220 U. S. 321.

The measure of recovery for the breach was the excess cost of completing the work and was not limited by Clause A to liquidated damages. *United States* v. *Maloney*, 4 App. D. C. 505.

The Government had a right to repudiate the contract on common-law principles, and is entitled to recover actual damages for the breach. *Bollman* v. *Burt*, 61 Maryland, 415; *Cleveland Rolling Mill* v. *Rhodes*, 121 U. S. 255; *Johnson* v. *Allen*, 78 Alabama, 387; *Norrington* v. *Wright*, 115 U. S. 188; *Pope* v. *Porter*, 102 N. Y. 366.

The defendant surety company was not discharged by the extension of time.

The surety consented in advance to the extension which was granted to the contractor. *Graham* v. *United States*, 231 U. S. 474; *United States* v. *McMullen, supra.*

Even if the surety did not so consent, it was not discharged by the extension, since it suffered no damage thereby. *Atlantic Trust & Deposit Co.* v. *Town of Laurinburg*, 163 Fed. Rep. 690; *Baglin* v. *Title Guaranty & Surety Co.*, 166 Fed. Rep. 356; *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416 (and other cases cited in brief).

The contract with the Atlantic, Gulf & Pacific Company was competent evidence to show the excess cost of completing the work. *Baer* v. *Sleicher*, 153 Fed. Rep. 129; *Graham* v. *United States, supra*, 481; *New York* v. *Second Ave. R. R. Co.*, 102 N. Y. 572; *United States* v. *McMullen, supra*, 471.

MR. JUSTICE LURTON delivered the opinion of the court.

This was an action by the United States against the Stone, Sand and Gravel Company, a corporation, hereinafter styled the contractor, and its surety, the American Surety Company of New York, to recover the excess cost of completion of a certain contract for excavating 7,500,000 cubic yards of earth within certain designated localities in the work of improving the harbor of Vicksburg, Mississippi. For this work the United States agreed to pay 8.49 cents per cubic yard as the work progressed and the contractor agreed to begin active work on or before December 5, 1899, with sufficient force and plant for an output of not less than 260,000 cubic yards per month, to be increased on or before June 5, 1900 to a plant adequate for an output of 330,000 cubic yards per month. Subsequently, upon application of the contractor, the time for beginning was extended to January 24, 1900. While by

January 24 the contractor had made large expenditures in preparing to commence work it had not on that day assembled the necessary force or plant. For this reason the Chief of Engineers on the following day confirmed a prior, anticipatory, recommendation of the engineer in charge that the contract should be annulled. An application for an extension of time was denied by the Secretary of War and on March 7, 1900 formal notice was given to the contractor, as required by the contract, that it had failed to prosecute the work of excavation, etc., "in accordance with specifications and requirements . . . and the said contract is hereby annulled." The work was relet at price of 12.4 cents per cubic yard, making an excess cost of $228,201.91, and an action was brought and judgment had against the contractor for that sum, minus a credit of $6,206.69, on account of certain voluntary work of an experimental character, which sum had been retained by the United States. There was also judgment against the Surety Company for $75,000, the full penalty of the bond.

The only breach of contract alleged was the failure to begin active operations on the day stipulated with a plant and force adequate to produce the monthly output required. The breach is confessed, but the error insisted upon here is that the contract, for such a breach, limits the measure of recovery to liquidated damages, namely, a forfeiture of all money or retained percentages due or to become due under the contract, and that the court below erred in allowing as damages the excess cost of the work under the reletting.

The clauses of the contract which give rise to this contention occur in the standard form of contract used by the War Department, known as form 19, and are the same clauses construed by this court in *United States* v. *O'Brien*, 220 U. S. 321. The clauses involved for purposes of reference may be described as clauses A and B. In clause A

it is expressly provided that if the contractor "fail to commence with the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect . . . and upon the giving of such notice, all money or reserve percentage due or to become due . . . by reason of this contract shall be and become forfeited to the United States. . . ." The engineer in charge is thereupon authorized, if an immediate performance of the work, "be, in his opinion, required by the public exigency, to proceed to provide for the same . . .", as prescribed in § 3709, Revised Statutes.

Following clause A are three other clauses dealing with changes in the work, cost of extra work and liabilities for labor and material furnished. Then comes clause B, which reads as follows:

"It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained, shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same."

That there was no abandonment of the contract by the plaintiffs in error is too plain to need discussion. Large expenditures were made to get ready, and further exten-

sions of time were sought both before and after notice of annulment. The explanation of the failure to get ready lies in the obvious fact that the contract was larger than the financial capacity of the contractor, and the United States was plainly within its contract right in putting it off the job and in reletting the work.

What is the measure of recovery against the contractor where the Government "annuls" the contract for failure to commence the work upon a stipulated day? The right to "annul," that is, to prohibit the contractor from going on under the contract, is plainly conferred in two distinct cases by clause A,—first, when the contractor fails to begin upon the day stipulated, and, second, when, having commenced the work, the contractor fails, "in the judgment of the engineer in charge to prosecute the work faithfully and diligently." In either case the same section specifically declares that upon the giving of the notice of annulment, "all money or reserve percentage due or to become due to the contractor . . . shall be and become forfeited to the United States."

It is therefore obvious that if the right to annul this contract depends upon clause A, the measure of damages recoverable in this action is limited by that clause to the forfeiture of all moneys or retained percentages due or to become due under the contract. *United States* v. *O'Brien, supra.* This is plainly conceded in the brief of the Solicitor General.

To escape confession of error in the judgment below, in so far as the United States was permitted to recover the excess cost of reletting the job, it has been argued that the right to annul the contract did not arise out of clause A, but was "a right inherent" in this and every other contract when time is of the essence, and that when there was, as in this case, a breach of an express agreement to begin the work upon a certain day, the right to annul was complete; and upon annulment the right to

recover all actual damages followed. Of course, this so-called "inherent right" to annul a contract with the consequent right to recover all actual damages as for a complete breach, are rights supposed to arise not out of any express agreement but out of the common law. But the assumption that aside from clause A an agreement to begin such a work on a particular day would be such a vital term of the contract as to justify the other party in an immediate annulment if the work was not so begun is seriously challenged. The vital character of time to the contract would depend upon its nature and particular circumstances. These might be such that time would not be of the essence of the contract at all. Any resort to the contract here involved as making time the essence of the agreement must include clause A, which expressly determines the consequences. Such an appeal to the contract would naturally result detrimentally to the argument here made, since the contract while making time vital provides also for the consequence of a breach in that respect. The benefit and the burden of clause A must hang together.

But we need not deal with the consequences as if clause A had been omitted. The right might have been inherent or not so vital as to justify the rigor of annulment. Both parties elected to deal with the matter by express stipulation and that should be and is the end of it. In such a situation there would be no justice in straining the contract for a construction which would limit its application to cases where the right of annulment would not exist without it. This contract was prepared in advance of the bidding by the United States. The bidder was required to dig with strict reference to its terms. One term was that the work should begin with a plant and force of definite capacity on or before a particular day. Another was that if this term was not complied with the United States might annul the contract and that as a consequence

of such annulment all money earned under it should be forfeited. This forfeiture is not made dependent upon the existence of any actual damage. Thus damages were by stipulation liquidated. That such damages may be in this instance inadequate may be true, but the fact affords no ground for frittering away the agreement by fanciful distinctions which never entered the head of either party to it.

The plain purpose was to obtain for the United States the right to take the contract from a bidder who should break his agreement at its threshold and let the work to another, possibly for a better price. At any rate the right to annul for a breach in respect of the time of beginning was a valuable right, and for it the Government stipulated and liquidated the damages in the event of its exercise. The contractor would not only lose his contract, but also would forfeit everything due him. The agreement settled the right and all the consequences of its exercise.

There is nothing in the case of *United States* v. *O'Brien*, *supra*, which would justify the limitation that the United States would now have us place upon this plain provision of the contract. The contract in that case was a dredging contract. The work was to begin on a day named and be completed on another. The contract was according to form 19 and included the two clauses, A and B, above set out. The work was begun on time. The first member of clause A was therefore eliminated from any consideration. The dredging did not progress to the satisfaction of the engineer in charge who elected to stop the contractor from going on, when, confessedly, time enough remained to complete the work within contract time. The United States, under these circumstances, sought to recover the excess cost of completing the work, but this court held that such excess cost could only be recovered under clause B for a failure to complete according to the terms of the agreement. There had been no breach of the agreement,

as time remained to finish the work had the contractor not been prohibited from going on because the engineer in charge was not satisfied with the progress of the job. But the right to annul for the latter reason was a right conferred by clause A, with the damages limited as therein provided. The United States was precluded from the rule of damages prescribed by clause B, and being forced to justify under clause A was held bound by the limitation of that clause.

The right to annul is expressly conferred by clause A for a failure to begin on the stipulated day. The United States resorted to that clause for its authority and pursued the procedure therein pointed out. It is plainly bound by the limitation of damages therein prescribed.

For the error in not so confining the recovery, the judgment is reversed and a new trial awarded.